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No. 99-

IN THE

# Supreme Court of the United States

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.,
*Petitioners,*

v.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS;
KEYMARKET OF NEPA INC., d/b/a WILK RADIO;
LACKAZERNE, INC., d/b/a WGBI RADIO;
JACK YOCUM, *et al.*,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the federal and Pennsylvania wiretapping statutes violate the First Amendment insofar as they prohibit the disclosure or other use of an unlawfully intercepted electronic communication by a person who was not involved in the interception itself, but who knows or has reason to know that the communication was unlawfully intercepted.

## PARTIES

In addition to the parties named in the caption, the complaint included as defendants a Jane Doe and John Doe, who were named as defendants-appellants in the Court of Appeals. The United States of America intervened as of right in the Court of Appeals pursuant to 28 U.S.C. § 2403.

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in *Gloria Bartnicki and Anthony F. Kane, Jr., v. Frederick W. Vopper, et al.*, 200 F.3d 109 (3d Cir. 1999).

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 200 F.3d 109 (3d Cir. 1999), and is reprinted in the appendix to this petition ("App.") at 1a-49a. The opinion of the United States District Court for the Middle Dis-

trict of Pennsylvania denying respondents' motions for summary judgment is unreported and is reprinted at App. 50a-58a. The opinion of the District Court denying reconsideration of that ruling is unreported and is reprinted at App. 59a-63a.

## JURISDICTION

The Court of Appeals entered judgment on December 27, 1999. Timely petitions for rehearing and suggestions of rehearing *en banc* were denied on February 25, 2000. App. 64a-67a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech."

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510 *et seq.*, provides in pertinent part as follows:

**§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited.**

(1) Except as otherwise specifically provided in this chapter any person who –

* * * *

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; [or]

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection[,]



shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

The Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons. Stat. § 5703 *et seq.*, provides in pertinent part as follows:

**§ 5703. Interception, disclosure or use of wire, electronic or oral communications**

Except as otherwise provided in this chapter, a person is guilty of a felony of the third degree if he:

* * * *

(2) intentionally discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; or

(3) intentionally uses or endeavors to use the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication.

* * * *

**§ 5725. Civil action for unlawful interception, disclosure or use of wire, electronic or oral communication**

(a) Cause of action. – Any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication . . . .

## STATEMENT OF THE CASE

### A. Factual Background

Petitioner Gloria Bartnicki was employed by the Pennsylvania State Education Association ("PSEA") to provide services and assistance to PSEA affiliates representing personnel employed by various public school districts. One of those affiliates, representing teachers employed by the Wyoming Valley West School District, was in contract negotiations during 1992-94, and Bartnicki was the chief negotiator for the Wyoming Valley teachers' union. App. 2a. Petitioner Anthony Kane, a teacher at Wyoming Valley West High School, was president of the union.

In May of 1993, Bartnicki and Kane had a telephone conversation concerning the negotiations. Kane was speaking on a conventional telephone at home; Bartnicki was in her car using a cellular phone. App. 2a. In their conversation, Bartnicki and Kane expressed their exasperation with the fact that the School Board had been "negotiating in the paper" by telling reporters that the Board would not agree to more than a three percent pay increase for the teachers. App. 3a. In condemning the Board's posture, Kane stated hyperbolically: "If they're not going to move for three percent, we're gonna have to go to their, their homes . . . to blow off their front porches, we'll have to do some work on some of those guys." App. 2a.

The conversation was intercepted and recorded onto a cassette tape by an unknown person, apparently using a scanner that



picked up the signal from Bartnicki's cellular handset. The tape then was placed by an unknown person in the mailbox of respondent Jack Yocum, the president of the Wyoming Valley West Taxpayers' Association, an organization opposed to the teacher union's bargaining proposals. App. 3a.

After listening to the tape and recognizing the voices of Bartnicki and Kane, Yocum gave a copy of the tape to respondent Frederick Vopper, who listened to the tape and then, on September 30, 1993, played the tape in its entirety on his talk show carried by radio stations WILK and WGBI, which are operated by respondents Keymarket of NEPA, Inc., and Lackazerne, Inc., respectively. *Id.*; JA 60a, 63a. Until that broadcast, Bartnicki and Kane did not know that their conversation had been intercepted and taped. JA 196a. It is undisputed that they intended for their conversation to remain private; indeed, the tape shows that Kane characterized the conversation as "very confidential." Appendix in the Court of Appeals ("JA") 32a.[1]

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[1] Vopper subsequently played the tape, or portions of it, over the air on numerous occasions. App. 3a. Some other members of the media had received copies of the tape before Vopper played it, but none of them played it until Vopper had done so. For example, the Wilkes-Barre Times Leader newspaper "had the tape from the spring of 93 and . . . they were not going to use it and . . . the only reason they did is because Fred [Vopper] revealed it." JA 107a. One or more radio stations besides WILK and WGBI also received the tape but declined to air it. JA 207a. Even after Vopper had played the tape and other members of the media had obtained copies from WILK, at least one station continued to be concerned about the propriety of playing a tape of a telephone call that obviously had been recorded without consent. JA 296a-297a.

There is evidence that the journalistic practices of Vopper and WILK are far from the norm of responsible radio broadcasters. The Luzerne County District Attorney testified that WILK is so irresponsible that WILK is the only radio station to which the District Attorney's office refuses to send its press releases. JA 159a-160a.

## B. The Federal and State Statutory Schemes

Both the United States Congress and the Pennsylvania legislature have enacted statutes that prohibit the conduct in which Yocum, Vopper, and the respondent radio stations engaged.

In 1968, Congress found that "[t]he tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized." S. Rep. No. 90-1097, at 67 (1968), reprinted in 1968 U.S.C.C.A.N. 2154. More specifically, Congress found as follows:

> Commercial and employer-labor espionage is becoming widespread. It is becoming increasingly difficult to conduct business meetings in private. Trade secrets are betrayed. Labor and management plans are revealed. No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage. [*Id.*]

In 1986, Congress found that the development of cellular telephones, computers, and other new means of electronic communication had made the problem even worse. "[T]remendous advances in telecommunications and computer technologies have carried with them comparable technological advances in surveillance devices and techniques,'' increasing the risk that communications "may be open to possible wrongful use and public disclosure by . . . unauthorized private parties." S. Rep. No. 99-541, at 3 (1986), reprinted in 1986 U.S.C.C.A.N. 3557.

Congress' response to these problems was to adopt a "comprehensive scheme for the regulation of wiretapping and electronic surveillance," *Gelbard v. United States*, 408 U.S. 41, 46



(1972), expressing a "fundamental policy adopted by Congress," *id.* at 47. That statutory scheme is Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 311, as amended by the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, 18 U.S.C. § 2510 *et seq.*

Consonant with the findings made by Congress, Title III broadly prohibits both the interception of electronic communications and the subsequent use of intercepted communications. With certain enumerated exceptions for specified law enforcement activities, the statute makes it unlawful "to intercept or endeavor to intercept, any wire, oral, or electronic communication." 18 U.S.C. § 2511(1)(a). And the statute contains three provisions which, together, prohibit comprehensively the subsequent use of unlawfully intercepted communications. The statute prohibits in broad terms "us[ing], or endeavor[ing] to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through [unlawful] interception." 18 U.S.C. § 2511(1)(d). To make clear that *disclosure* is included among the prohibited uses of such communications, the statute specifically prohibits "intentionally disclos[ing], or endeavor[ing] to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through [unlawful] interception." 18 U.S.C. § 2511(1)(c). And a third provision makes clear that the prohibition of the use of unlawfully intercepted communications applies not only to private dealings, but to every kind of government proceeding as well—federal, state, and local. 18 U.S.C. § 2515.

Title III provides for a civil action by "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of [the Act]." 18 U.S.C. § 2520(a).

Pennsylvania has enacted a Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons. Stat. § 5703 *et seq.*, which contains provisions very similar to the relevant portions of Title III. The Pennsylvania statute prohibits "intentionally us[ing] or endeavor[ing] to use the contents of any wire, electronic or oral communication . . ., knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication," *id.* § 5703(3), and "intentionally disclos[ing] or endeavor[ing] to disclose" the contents of such a communication, *id.* § 5703(2). A civil action is made available to "[a]ny person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this chapter." *Id.* § 5725(a).

A majority of the states have enacted similar provisions.[2]

### C. Proceedings Below

Bartnicki and Kane sued Yocum, Vopper, WILK and WGBI under both the federal and statue statutes, for having used and

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[2] In dissent, Judge Pollak identified twenty-one states besides Pennsylvania, as well as the District of Columbia, that have "enacted provisions which, like the federal statute, (1) prohibit disclosure by one who knows or has 'reason to know' that [an] interception was unlawful, and (2) authorize civil damage actions against one who discloses or uses such unlawful interception." App. 44a. At least two states not listed by Judge Pollak – Missouri and Texas – also fit that description. *See* Mo. Rev. Stat. §§ 542.402.1 (3), (4), 542.418.2(1); Tex. Penal Code Ann. § 16.02(b)(2), (3); Tex. Crim. Pro. Code Art. 18.20 § 16. And at least five other states have similar prohibitions, which apparently were not listed by Judge Pollak because he included only states that authorize "civil damage actions." App. 44a. These five states make it a criminal offense to disclose or otherwise to use a communication that a person knows or has reason to know was unlawfully intercepted, but the availability of a civil remedy is unclear. *See* Alaska Stat. § 42.20.300(d); Colo. Rev. Stat. § 18-9-303(c); Okla Stat. Ann. tit. 13, § 176.3.3, .4; Or. Rev. Stat. § 165.540(1)(e); R.I. Gen. Laws § 11-35-21(a)(2), (3). Under the Third Circuit's holding, which does not turn on whether the sanction for a violation is criminal, civil, or both, all of these state statutes would be unconstitutional.



disclosed the tape of their intercepted telephone conversation. Cross-motions for summary judgment were denied by the District Court, App. 50a-58a, and that court denied respondents' motion for reconsideration, App. 59a-63a.

The District Court then certified two questions for appeal pursuant to 28 U.S.C. § 1292(b): "(1) whether the imposition of liability on the media Defendants under [Title III and the Pennsylvania statute] solely for broadcasting the newsworthy tape . . ., when the tape was illegally intercepted and recorded by unknown persons who were not agents of Defendants, violates the First Amendment; and (2) whether imposition of liability under the aforesaid . . . Statutes on Defendant Jack Yocum solely for providing the anonymously intercepted and recorded tape to the media defendants violates the First Amendment." App. 4a. Respondents Vopper, WILK and WGBI petitioned for permission to appeal, and respondent Yocum filed an answer to the petition in which he joined the media defendants' request. *Id.* The Court of Appeals granted the petition for permission to appeal.

After the case had been briefed and argued, the Clerk of the Court of Appeals sent a letter to the United States Attorney providing notice pursuant to 28 U.S.C. § 2403(a), which grants the United States the right to intervene in any action "wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question." The United States accepted that invitation and filed a brief "to defend the constitutionality of Title III . . . as applied in this case." Brief for the United States in *Bartnicki, et al. v. Vopper, et al.*, No. 98-7156, at 1 (3d Cir.). PSEA was granted leave to file a brief *amicus curiae*, in which it defended the constitutionality of the state and federal statutes as applied to the conduct at issue in this case.

By a 2-1 vote, the Third Circuit reversed the District Court's order denying summary judgment to the defendants. The Court of Appeals announced its holding as follows: "We . . . hold that the [state and federal] Wiretapping Acts fail the test of intermediate scrutiny [under the First Amendment] and may not consti-

tutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception." App. 35a.

In reaching that conclusion, the court "focus[ed] on the United States'. . . contention . . . that the provisions [of Title III prohibiting the disclosure or other use of intercepted communications] promote privacy by eliminating the demand for intercepted materials on the part of third parties." App. 28a. The court "was satisfied that this . . . justification does not rely on the communicative impact of speech and, therefore, that the Acts are property treated as content-neutral." App. 23a. The court therefore "adopt[ed] the government's position that we should apply intermediate scrutiny [rather than strict scrutiny] in our analysis of the issue before us." *Id.* The Third Circuit held nonetheless that the challenged provisions cannot withstand such scrutiny.

Stating that "[t]he connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception is indirect at best," App. 28a, and noting that no evidence had been offered on the point, the Third Circuit majority was "not prepared to accept the United States' unsupported allegation that the statute is likely to produce the hypothesized effect." *Id.* The court further declared that "the government's desired effect can be reached" by punishing those who "participated in the interception," making it unnecessary, in the Third Circuit's view, to allow recourse against third parties who disclose or otherwise use communications that they know, or have reason to know, were illegally intercepted by others. App. 30a. And the majority was "also concerned," *id.*, that the statute might deter the media "from publishing even material that may lawfully be disclosed under the Wiretapping Acts," *id.*, because a reporter might be uncertain as to how the content of a communication was obtained. (The United States had suggested procedural rules that would alleviate any such concern, *see* App. 47a-48a (Pollak, J. dissenting), but the majority failed to mention them.)



The Third Circuit recognized that, separate and apart from whatever effect a prohibition of disclosure and other uses of intercepted communications may have in deterring interception in the first place, such a prohibition serves the government's "significant interest," App. 22a, in protecting privacy interests from *the harm caused directly by disclosure*, which "compound[s]" the "invasion of privacy" that is initiated by the unlawful interception of a communication. App. 21a (quoting *Providence Journal Co. v. FBI*, 602 F.2d 1010, 1013 (1st Cir. 1979)). But the majority declined to consider this justification for the challenged statutory provisions, other than to express the concern that, under such a rationale, the statutes' prohibition of disclosure might be "subject to strict scrutiny as a content-based regulation." App. 23a.

Judge Pollak, sitting by designation, dissented. He disagreed with the majority's view that "[t]he connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception is indirect at best." App. 42a ((Pollak, J., dissenting) (quoting App. 28a) (majority opinion)). And Judge Pollak sharply took issue with the majority's refusal to consider the compounding of injury that is caused by deliberate disclosure of an intercepted communication. As Judge Pollak saw it, "unauthorized disclosure (or other use) of private conversations is a central aspect of the very evil the challenged statutory provisions are designed to combat." App. 46a.

Petitioners Bartnicki and Kane moved for rehearing and suggested rehearing *en banc*, as did the United States. The petitions were denied, with the suggestion of rehearing *en banc* being rejected by a vote of 6 to 5. App. 65a, 67a.

## REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the decision below conflicts with a decision of the Court of Appeals for the District of Columbia Circuit; strikes down provisions of both a federal and a state statute; calls into question the constitutionality of provisions enacted by a majority of the states; and decides incorrectly an important question of constitutional law reserved by this Court in previous decisions.

### A. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT IN BOEHNER v. McDERMOTT

The holding of the Third Circuit in this case is that Title III and its state counterparts "may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception." App. 35a. The District of Columbia Circuit held precisely the opposite in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999).

As in this case, in *Boehner* there was no allegation that the defendant, Representative James McDermott, had participated in or encouraged the interception of any communication. Rather, two private citizens who had no connection to McDermott – the Martins – intercepted (by use of a scanner) a conference call in which the plaintiff, Representative John Boehner, participated via cellular car telephone. In the course of the call, then-Speaker of the House Newt Gingrich engaged in conduct that might have violated the terms of an agreement Gingrich recently had made with the House Ethics Committee. 191 F.3d at 465. The Martins taped the call and delivered the tape to McDermott, who was then the ranking Democratic member of the Committee. McDermott proceeded to give copies of the tape to the media. *Id.*



The D.C. Circuit held that the First Amendment did not shield McDermott from liability under Title III, despite the fact that he played no role in the interception of the telephone call. In holding that McDermott could be sued for having disclosed the communication that had been intercepted by others, the D.C. Circuit found sufficient both of the justifications for the prohibition of such disclosure that were deemed insufficient by the Third Circuit in this case:

> Unless disclosure is prohibited, there will be an incentive for illegal interceptions; and unless disclosure is prohibited, the damage caused by an illegal interception will be compounded. It is not enough to prohibit disclosure only by those who conduct the unlawful eavesdropping. One would not expect them to reveal publicly the contents of the communication; if they did so they would risk incriminating themselves. It was therefore "essential" for Congress to impose upon third parties, that is, upon those not responsible for the interception, a duty of nondisclosure.

*Id.* at 470.

The conflict between the Third Circuit's decision in this case and the D.C. Circuit's decision in *Boehner* is clear and inescapable. The Third Circuit attempted to distinguish the cases, App. 33a-34a, but the attempt fails. It is true, as the court below stated, that *Boehner* involved no media defendant, while this case does. But the Third Circuit invalidated the statutes even as applied to the *non*-media defendant in this case—respondent Yocum. Furthermore, the Third Circuit's analysis refers broadly to all "third parties," App. 28a, not only to the media; and the holding announced by the court makes no distinction between media and non-media defendants. *See* App 35a. Indeed, the Third Circuit acknowledged that "technically, defendant Yocum

in our case stands in the same position as McDermott, *i.e.*, as the source but not the interceptor." App. 33a.[3]

## B. THE DECISION BELOW STRIKES DOWN IMPORTANT PROVISIONS OF A FEDERAL STATUTE, AND CALLS INTO QUESTION THE CONSTITUTIONALITY OF STATUTES ENACTED BY A MAJORITY OF THE STATES

Even if there were no conflict in the circuits, certiorari would be warranted in this case "to review the exercise of the grave power of annulling an Act of Congress." *United States v. Gainey*, 380 U.S. 63, 65 (1965).

In holding that "the Wiretapping Acts fail the test of intermediate scrutiny," App. 35a, the Third Circuit deprived subsections (c) and (d) of 18 U.S.C. § 2511—the provisions that prohibit disclosure and other uses of intercepted communications—of virtually any independent force. By holding that the First Amendment bars any application of those subsections except as to persons who have participated in an unlawful interception, the Third Circuit has taken subsections (c) and (d) off the books except as to defendants who have violated subsection (a) as well. The Third Circuit's near-total invalidation of these important statutory provisions warrants review by this Court.

And, the fact that some thirty states also have enacted statutory provisions that, under the Third Circuit's holding, would be

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[3] The Third Circuit noted that McDermott, unlike Yocum, knew (albeit only after the fact) the identity of the persons who intercepted the communication, and McDermott may have actively sought to obtain the tape once he knew it existed. App. 33a-34a. On the Third Circuit's own constitutional analysis, those distinctions should make no difference. And under the Third Circuit's *holding*, they *certainly* make no difference, because the rule stated by the Third Circuit allows liability only where "the defendants participated in or encouraged *th[e] interception*." App. 35a (emphasis added). There was no such participation or encouragement by the defendant in *Boehner*, any more than there was in this case.



found unconstitutional, *see supra* note 2, is another powerful reason why this Court should review the decision below. *See New York v. O'Neill*, 359 U.S. 1, 3 (1959).

## C. THE DECISION BELOW DECIDES INCORRECTLY AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW THAT HAS BEEN RESERVED BY THIS COURT IN PREVIOUS DECISIONS

In four previous cases, this Court has addressed the "tension between the right which the First Amendment accords to a free press, on the one hand, and the protections which various statutes . . . accord to personal privacy against the publication of truthful information, on the other." *Florida Star v. B.J.F.*, 491 U.S. 524, 530-31 (1989) (citing *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Oklahoma Publishing Co. v. Oklahoma County Dist. Court*, 430 U.S. 308 (1977); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)). *Cf. Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (involving confidentiality requirement imposed by agreement rather than by statute); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (involving confidentiality requirement imposed by common law); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (involving confidentiality requirement imposed to promote asserted interests of the judicial system rather than to protect privacy interests).

The number of occasions on which this Court has been called upon to address facets of the problem presented here testifies to the importance and difficulty of the constitutional issues that arise when privacy interests and First Amendment concerns intersect. This Court's decisions illuminate the basic principles that should be applied in this context, under which, we believe, the Third Circuit's decision is plainly incorrect. However, the Court has not yet decided whether (or in what circumstances) a statute that protects privacy interests by making it unlawful for a person to disclose information *unlawfully obtained by another* violates the First Amendment – indeed, the Court has explicitly

reserved that question. That important question is presented in this case, and this case provides an ideal vehicle to resolve it.

a. In *Florida Star*, *Smith*, *Oklahoma Publishing*, and *Cox Broadcasting*, this Court struck down statutes (or, in *Oklahoma Publishing*, an injunction) that barred the media from reporting particular facts. Each of those cases involved—and this Court emphasized—five factors not present here. A brief consideration of those five factors demonstrates that the question presented in this case remains open in this Court, and that the Third Circuit's analysis of that question is unpersuasive.

*First*, in each of the previous "privacy/First Amendment" cases decided by this Court, the statute or court order that was challenged prohibited *only publication*, not any other use, of the information in question. Here, in contrast, § 2511(1) prohibits equally disclosure and *all other uses* of unlawfully intercepted communications. Thus, unlike in the prior cases, there is no singling out of speech for special sanction. *Cf. Cohen v. Cowles Media Co.*, 501 U.S. at 669 (generally applicable laws do not offend the First Amendment simply because their prohibitions apply to speech as well as to other activities).

*Second*, in each of the prior cases, the government had prohibited publication by *the media*, or by some segment thereof, but had left others free to disclose the information in question. *Florida Star* involved a statute that applied only to "instrument[s] of mass communication," *see* 491 U.S. at 526 n.1, 540; the statute in *Smith* applied only to newspapers, *see* 443 U.S. at 98, 104-05; *Oklahoma Publishing* involved an injunction against publication by "the news media," *see* 430 U.S. at 308; and *Cox Broadcasting* involved a statute that applied only to the mass media, *see* 420 U.S. at 471 n. 1. Not only did this constitute unequal treatment of speakers, but it undercut the force of the government's argument that there was a vital need to prevent disclosure of the information in question. Title III, in contrast, "does not target or single out the press," *Cohen*, 501 U.S. at 670,



but prohibits *all* disclosure or other use of an unlawfully intercepted communication by *any* person who knows or has reason to know that the communication was unlawfully intercepted.

*Third*, in each of the prior cases, *the government itself had provided the media with the information in question*, thus further belying the claim that a vital state interest in the protection of privacy was at stake. *See Florida Star*, 491 U.S. at 527 (reporter obtained the name of a rape victim from a police report that was publicly available in the police pressroom); *Smith*, 443 U.S. at 99 (reporters obtained the name of a juvenile offender "simply by asking . . . the police, and an assistant prosecuting attorney"); *Oklahoma Publishing*, 430 U.S. at 309, 311 (reporter learned the name of a juvenile offender from a proceeding in open court); *Cox Broadcasting*, 420 U.S. at 472-73 (reporter learned the name of a rape victim from "public records available for inspection").

*Fourth*, in each of the prior cases, the government asserted the right to prevent publication only of information on *certain specific topics*: the name of an alleged victim (*Florida Star*; *Cox Broadcasting*) or perpetrator (*Smith*; *Oklahoma Publishing*) of a crime. Title III, in contrast, makes no distinctions based on the subject matter of a communication.

*Finally*, because, as we have noted, in each of the prior cases the information claimed to be confidential had been provided to the media by the government, in none of those cases did this Court decide "whether, in cases where information has been acquired *unlawfully* by a newspaper *or by a source*, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." *Florida Star*, 491 U.S. at 535 n.8 (second emphasis added).

b. This case presents the question thus reserved in *Florida Star*, free of the factors that undermined the arguments of the government in that case and in *Smith*, *Oklahoma Publishing* and *Cox Broadcasting*.

The D.C. Circuit properly recognized in *Boehner* that *Florida Star* and its precursors do not suggest that the statutory provisions challenged here are unconstitutional. *See Boehner*, 191 F.3d at 471-76. The Third Circuit, on the other hand, although acknowledging that none of this Court's precedents decides this case, *see* App. 9a-12a, declared that "the [Supreme] Court has generally tilted for the First Amendment in the tension between press freedom and privacy rights." App. 32a n. 7. Ignoring all of the crucial factors that were emphasized by this Court in the *Florida Star* line of cases, the Third Circuit translated that perceived "tilt" into a simplistic notion that state interests in privacy, no matter how strong, are "insufficient to justify . . . burdens imposed on First Amendment freedoms." App. 35a. That is an untenable overreading of this Court's cases, and should not go unreviewed.

* * * *

The governmental interests at issue here are substantial. Congress found that the ease with which electronic communications may be intercepted, and the harm that is caused when such intercepted communications are disclosed or otherwise "turned against the speaker," *see supra* at 6, make it necessary to prohibit such disclosure and use, both to protect privacy for its own sake and because the absence of such protection "may unnecessarily discourage potential customers from using innovative communications systems . . . [and] may discourage American business from developing new innovative forms of telecommunications and computer technology." S. Rep. No. 99-541, at 5; 1986 U.S.C.C.A.N. 3559. Judge Pollak's dissent and the D.C. Circuit's decision in *Boehner* demonstrate convincingly that the statutory provisions struck down by the Third Circuit are necessary to protect those interests.[4]

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[4] The Third Circuit's suggestion that these statutory purposes might be deemed "content-based" and thus trigger strict scrutiny, App. 23a, is plainly wrong. As the *Boehner* court explained, a prohibition of the disclosure of intercepted communications is *not* a content-based regulation, because liability turns on "the method of acquisition not the contents of the communication." 191 F.3d at 478. Strict scrutiny is not triggered merely because a statute applies to certain communications but not to others, if the statutory distinction does not present a "risk of excising certain ideas or viewpoints from the public dialogue," *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994), and there is no danger that the distinction is based on "disagreement with [a particular] message," *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). *See also Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32, 34-35 (1984) (applying intermediate scrutiny to protective order requiring nondisclosure of information received in discovery).

The Third Circuit also erred in refusing "to accept the . . . allegation," App. 28a, that prohibiting disclosure and other uses of unlawfully intercepted communications will tend to deter such interception. As the D.C. Circuit recognized in *Boehner*, the concept that "dry[ing] up the market" will discourage unlawful activity is a commonsense proposition that underlies a number of federal statutes. 191 F.3d at 469-70. Even without compiling evidence on the point, it was "surely reasonable," *Osborne v. Ohio*, 495 U.S. 103, 109 (1990), for Congress to apply that concept here. *Cf. Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897, 900 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.")



In sum, the decision below strikes down important provisions of a federal statute, and calls into question the constitutionality of statutes in a majority of the states, on the basis of an analysis that squarely conflicts with *Boehner*, and that misapplies this Court's precedents in deciding an important constitutional question that has not been, but should be, resolved by this Court.

## CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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# APPENDICES

## APPENDIX A

## UNITED STATES COURT OF APPEALS
## THIRD CIRCUIT

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No. 98-7156

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GLORIA BARTNICKI AND ANTHONY F. KANE, JR.

v.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS; KEYMARKET OF NEPA, INC., d/b/a WILK RADIO; LACKAZERNE, INC., d/b/a WGBI RADIO; JANE DOE; JOHN DOE; JACK YOCUM,

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS; KEYMARKET OF NEPA, INC., d/b/a WILK RADIO; LACKAZERNE, INC., d/b/a WGBI RADIO; JACK YOCUM,

*Appellants,*

UNITED STATES OF AMERICA,

*Intervenor.*

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Argued Oct. 5, 1998.

Decided Dec. 27, 1999.

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Before: SLOVITER and COWEN, Circuit, Judges, and POLLAK,* District Judge

### OPINION OF THE COURT

SLOVITER, Circuit Judge.

At issue is whether the First Amendment precludes imposition of civil damages for the disclosure of portions of a tape recording of an intercepted telephone conversation con-

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* Hon. Louis H. Pollak, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

taining information of public significance when the defendants, two radio stations, their reporter, and the individual who furnished the tape recording, played no direct or indirect role in the interception.

I.

BACKGROUND

A.

From the beginning of 1992 until the beginning of 1994, Wyoming Valley West School District was in contract negotiations with the Wyoming Valley West School District Teachers' Union (the "Teachers' Union") over the terms of the teachers' new contract. The negotiations, which were markedly contentious, generated significant public interest and were frequently covered by the news media.

Plaintiffs Gloria Bartnicki and Anthony F. Kane, Jr., as well as defendant Jack Yocum, all were heavily involved in the negotiating process. Bartnicki was the chief negotiator on behalf of the Teachers' Union. Kane, a teacher at Wyoming Valley West High School, served as president of the local union. Yocum served as president of the Wyoming Valley West Taxpayers' Association, an organization formed by local citizens for the sole purpose of opposing the Teachers' Union's proposals.

In May of 1993, Bartnicki, using her cellular phone, had a conversation with Kane. They discussed whether the teachers would obtain a three-percent raise, as suggested by the Wyoming Valley West School Board, or a six-percent raise, as suggested by the Teachers' Union. In the course of their phone conversation, Kane stated:

> If they're not going to move for three percent, we're gonna have to go to their, their homes . . . to blow off their front porches, we'll have to do some work on some of those guys. . . . Really, uh, really and truthfully, be-



> cause this is, you know, this is bad news (undecipherable) The part that bothers me, they could still have kept to their three percent, but they're again negotiating in the paper. This newspaper report knew it was three percent. What they should have said, 'we'll meet and discuss this.' You don't discuss the items in public.

App. at 35-36. Bartnicki responded, "No," and, Kane continued, "You don't discuss this in public. . . . Particularly with the press." App. at 36.

This conversation, including the statements quoted above, was intercepted and recorded by an unknown person, and the tape left in Yocum's mailbox. Yocum retrieved the tape, listened to it, and recognized the voices of Bartnicki and Kane. He then gave a copy of the tape to Fred Williams, also known as Frederick W. Vopper, of WILK Radio and Rob Neyhard of WARM Radio, both local radio stations. Williams repeatedly played part of the tape on the air as part of the Fred Williams Show, a radio news/public affairs talk show which is broadcast simultaneously over WILK Radio and WGBI-AM. The tape was also aired on some local television stations and written transcripts were published in some newspapers.

B.

Bartnicki and Kane sued Yocum, Williams, WILK Radio, and WGBI Radio (hereafter "media defendants") under both federal and state law. They based their federal claims on Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, 28 U.S.C. § 2510 *et seq.*, and their state claims on the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons.Stat. § 5701 *et seq.* As relief, Bartnicki and Kane sought (1) actual damages in excess of $50,000, (2) statutory damages under 18 U.S.C. § 2520(c)(2), (3) liquidated damages under 18 Pa. Cons.Stat.

§ 5725(a)(1), (4) punitive damages, and (5) attorneys' fees and costs.

Bartnicki, Kane, and the defendants each moved for summary judgment. The District Court denied these motions on June 14, 1996 and denied defendants' motion to reconsider on November 8, 1996, specifically holding that imposing liability on the defendants would not violate the First Amendment.

The District Court subsequently certified two questions as controlling questions of law: "(1) whether the imposition of liability on the media Defendants under the [wiretapping statutes] solely for broadcasting the newsworthy tape on the Defendant Fred Willams' radio news/public affairs program, when the tape was illegally intercepted and recorded by unknown persons who were not agents of the Defendants, violates the First Amendment; and (2) whether imposition of liability under the aforesaid [wiretapping statutes] on Defendant, Jack Yocum solely for providing the anonymously intercepted and recorded tape to the media Defendants violates the First Amendment." App. at 388. Williams, WILK Radio, and WGBI Radio subsequently petitioned for permission to appeal. Yocum filed an answer to the Petition in which he joined the media defendants' request that we hear this appeal. We granted the petition by order Dated February 26, 1998. The Pennsylvania State Education Association submitted a brief as *amicus curiae* in support of the appellees, and the United States has intervened as of right pursuant to 28 U.S.C. § 2403.

C.

The District Court had jurisdiction to consider claims based on the Omnibus Crime Control and Safe Streets Act of 1968 pursuant to 28 U.S.C. § 1331. It had supplemental jurisdiction pursuant to 28 U.S.C. § 1367 to consider claims based on the Pennsylvania Wiretapping and Electronic Surveillance Control Act. We have appellate jurisdiction to review the District



Court's substantive determination pursuant to 28 U.S.C. § 1292(b).

The scope of our review in a permitted interlocutory appeal is limited to questions of law raised by the underlying order. We are not limited to answering the questions certified, however, and may address any issue necessary to decide the appeal. *See Dailey v. National Hockey League*, 987 F.2d 172, 175 (3d Cir.1993).

We review the grant or denial of a motion for summary judgment *de novo*. *See H.K. Porter* Co. *v. Pennsylvania Ins. Guaranty Ass'n*, 75 F.3d 137, 140 (3d Cir. 1996). We are "required to apply the same test the District court should have utilized initially," to view inferences to be drawn from the underlying facts in the light most favorable to the party opposing the motion, and to take the non-movant's allegations as true whenever these allegations conflict with those of the movant. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir.1976).

D.

The Federal Omnibus Crime Control and Safe Streets Act of 1968 (the "Federal Wiretapping Act") provides in relevant part:

> (1) Except as otherwise specifically provided in this chapter any person who—
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communi-

> cation, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this sub section . . .
>
> shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2511. It continues:

> (a) **In general**.—Except as provided in section 2511 (2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in the violation such relief as may be appropriate.

18 U.S.C. § 2520. The Federal Wiretapping Act thus creates civil and criminal causes of action against those who intentionally use or disclose to another the contents of a wire, oral, or electronic communication, knowing or having reason to know that the information was obtained in violation of the statute.

The Pennsylvania Wiretapping and Electronic Surveillance Control Act (the "Pennsylvania Wiretapping Act") is similar. It provides:

> Except as otherwise provided in this chapter, a person is guilty of a felony of the third degree if he:
>
> (2) intentionally discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; or
>
> (3) intentionally uses or endeavors to use the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication.



18 Pa. Cons.Stat. § 5703. It further provides:

> (a) Cause of action—Any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication . . . .

18 Pa. Cons.Stat. § 5725. The Pennsylvania Wiretapping Act thus also creates civil and criminal causes of action based on the knowing or negligent use or disclosure of illegally intercepted material. We refer to the federal and state statutes at issue here as "The Wiretapping Acts."

Both Acts also explicitly authorize the recovery of civil relief. The Federal Wiretapping Act provides that a court may assess as damages whichever is the greater of—

> (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or
>
> (B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

18 U.S.C. § 2520(c)(2). The Pennsylvania Wiretapping Act specifies that a successful plaintiff shall be entitled to recover from any such person:

> (1) Actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation, or $1,000, whichever is higher.
>
> (2) Punitive damages.
>
> (3) A reasonable attorney's fee and other litigation costs reasonably incurred. 18 Pa. Cons.Stat. § 5725(a).

## II.

## DISCUSSION

### A.

As the District Court acknowledged and the parties do not dispute, the media defendants neither intercepted nor taped the conversation between Bartnicki and Kane. Indeed, the record does not disclose how or by whom the conversation was intercepted. The media defendants argued before the District Court that these facts preclude a court from finding them liable under the Wiretapping Acts. The District Court disagreed. It concluded that, "a violation of these acts can occur by the mere finding that a defendant had a reason to believe that the communication that he disclosed or used was obtained through the use of an illegal interception." *Bartnicki v. Vopper*, No. 94—1201, slip op. at 5 (M.D. Pa. June 17, 1996). It further opined that such an interpretation of the statute "adheres to the purpose of the act which was to protect wire and oral communications and an individual's privacy interest in such." *Id.* The District Court concluded that genuine disputes of material fact remain regarding (1) whether the Bartnicki-Kane conversation was illegally intercepted, and if so (2) whether any or all of the Defendants knew or had reason to know that that conversation was illegally intercepted. *See id.* at 5, 10. The parties do not challenge these holdings on appeal.

Hence, this case does not involve the prohibitions of the Wiretapping Acts against the actual *interception* of wire communications. Nor does it involve any application of the Acts' criminal provisions. Rather, this case focuses exclusively on the portions of the Wiretapping Acts that create causes of action for civil damages against those who use or disclose intercepted communications and who had reason to know that the information was received through an illegal interception.



The defendants argue that applying the damages provision of the Wiretapping Acts to hold them liable for disclosing the Bartnicki-Kane conversation violates the First Amendment. They contend that this case is controlled by the Supreme Court's decisions in a series of cases addressing the tension between the First Amendment and the right to privacy.

In the first of these cases, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), the Court considered a private right of action created by a Georgia statute making it a "misdemeanor to publish or broadcast the name or identity of a rape victim." *Id.* at 472, 95 S.Ct. 1029. The Court was asked to decide whether Georgia could impose civil liability on a television broadcasting company, among others, for accurately broadcasting the name of a deceased, 17-year-old rape victim where the reporter obtained the information from official court records open to public inspection.

In the next case, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978), the Court reviewed a Virginia statute that both provided for the confidentiality of judicial disciplinary proceedings and made it unlawful to divulge the identity of a judge subject to such proceedings prior to the filing of a formal complaint with the state's highest court. The Supreme Court was asked to decide whether Virginia could criminally prosecute a newspaper for publishing accurate information about such proceedings where the newspaper received the information from a participant in the proceedings who had the right to receive the information but not the right to divulge it. *See id.* at 830, 98 S.Ct. 1535.

Finally, in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979), the Court considered a West Virginia statute "making it a crime for a newspaper to publish, without the written approval of the juvenile court, the name of any youth charged as a juvenile offender."

*Id.* at 98, 99 S.Ct. 2667. The Court was asked to decide whether West Virginia could prosecute two newspapers for publishing the name of a 14-year-old student who was accused of shooting and killing a 15-year-old classmate at the local junior high school. The newspapers had obtained the student's name by interviewing witnesses at the school.

The Supreme Court concluded that each of these attempts to punish or deter the press's publication of truthful information was unconstitutional. The *Smith* Court, in summarizing the Court's past cases, read them as suggesting at least two propositions: (1) "state action to punish the publication of truthful information seldom can satisfy constitutional standards," and (2) "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." 491 U.S. at 102, 103, 109 S.Ct. 2324; *accord Florida Star v. B.J.F.*, 491 U.S. 524, 533-37, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) (adopting and explaining the justification for the second *Smith* proposition).

The defendants contend that the information disclosed about the Bartnicki-Kane conversation was lawfully obtained within the meaning of the *Smith* decision because the defendants in this case neither participated in the presumed interception nor violated any law by receiving the information. They conclude that the Wiretapping Acts may not be applied to hold them liable without first meeting the test of strict scrutiny.

Bartnicki and Kane respond by arguing that the information at issue here was unlawfully obtained because the original interception presumably was illegal. They conclude that applying the Acts to hold the defendants liable is constitutional without subjecting those statutes to any level of First Amendment scrutiny. The parties thus assume that we should determine the constitutionality of the Wiretapping Acts by



first determining whether the information disclosed was "lawfully" or "unlawfully" obtained.

Although we are cognizant of the importance of the *Cox*, *Landmark*, and *Smith* cases as background, we decline to read *Smith* as controlling here. The Supreme Court has explicitly repudiated any suggestion that *Smith* answers the question whether a statute that limits the dissemination of information obtained by means of questionable legality is subject to First Amendment scrutiny. In *Florida Star*, the Court stated, "The [*Smith*] principle does not settle the issue whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." 491 U.S. at 535 n. 8, 109 S.Ct. 2603. Similarly, the *Smith* Court was careful to note that its holding did not reach the issue of unlawful press access. *See* 443 U.S. at 105, 99 S.Ct. 2667.

Moreover, the Supreme Court's practice of narrowly circumscribing its holdings in this area strongly suggests that a rule for undecided cases should not be derived by negative implication from its reported decisions. The defendant in *Landmark* urged the Court to adopt a blanket rule, protecting the press from any liability for truthfully reporting information concerning public officials and their public duties, but the Supreme Court refused to do so. *See* 435 U.S. at 838, 98 S.Ct. 1535. Instead it considered the very narrow question: "whether [a state] may subject persons, including newspapers, to criminal sanctions for divulging information regarding proceedings before a state judicial commission which is authorized to hear complaints as to judges' disability or misconduct, when such proceedings are declared confidential by the State Constitution and statutes." *Id.* at 830, 98 S.Ct. 1535.

Similarly, the *Florida Star* Court refused "appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment." 491 U.S. at

532, 109 S.Ct. 2603. It stated: "Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily. . . . We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Id.* at 532-33, 109 S.Ct. 2603.

In keeping with the Supreme Court's approach to deciding these illustrative cases, we will resolve the present controversy not by mechanically applying a test gleaned from *Cox* and its progeny, but by reviewing First Amendment principles in light of the unique facts and circumstances of this case.

B.

The District Court based its conclusion that the damages provision of the Wiretapping Acts may constitutionally applied be applied to penalize the defendants' conduct primarily on the Supreme Court's decision in *Cohen v. Cowles Media Co.*, 501 U.S. 663, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991). The District Court interpreted that decision as standing for the proposition that a generally applicable law that neither singles out the press for special burdens nor purposefully restricts free expression does not offend the First Amendment. *See Bortnicki*, slip op. at 8 ("Generally applicable laws 'do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.'" (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991))). The District Court emphasized language from the *Cohen* opinion in which the Supreme Court stated, " '[it] is beyond dispute that the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.' " *Bartnicki*, slip op. at 8 (quoting *Cohen*, 501 U.S. at 670, 111 S.Ct. 2513).



After reviewing the Federal and Pennsylvania Wiretapping Acts, the District Court found that neither Act targets or singles out the press. The District Court also opined that these laws are not "specifically designed to chill free speech." *Id.* at 7. Based on this finding, it concluded that "both acts are matters of general applicability" and, without further analysis, denied defendants' motion for summary judgment on the basis of the First Amendment.

There is reason to question whether the damages provisions of the Acts are properly categorized as generally applicable laws. Arguably, that term should be reserved for laws that directly regulate conduct rather than speech. *See* infra at 119. Moreover, it may well be that be that [sic] by banning the disclosure of certain information, the damages provisions impose a disproportionate burden on the press. Indeed, we would not be surprised to find that a prohibition on disclosure falls more heavily on the press, which is in the business of disseminating information, than it does on ordinary citizens whose opportunities for spreading information are more limited.

We need not resolve that question, however, because we conclude that, by suggesting that generally applicable laws do not require First Amendment scrutiny when applied to the press, the District Court read the cited portions of *Cohen* too broadly. In *Cohen*, the plaintiff, who was actively associated with the election staff of a gubernatorial candidate, offered to provide two newspapers with some information concerning the candidate's opponent in exchange for a promise that the newspapers would not use his name in any resulting story. After having made the promise and secured the information, each newspaper proceeded to publish a story identifying Cohen as the source of the information and highlighting his role in the gubernatorial campaign. Cohen lost his job the day

the stories ran. He then sued the publishers of the newspapers in state court and recovered damages under a theory of promissory estoppel. The publishers appealed, arguing that holding them liable for their breached promises would violate the First Amendment.

It is in the context of rejecting this argument that the Supreme Court stated, "[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen*, 501 U.S. at 669, 111 S.Ct. 2513. The Court explained that "enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." *Id.* at 670, 111 S.Ct. 2513.

The *Cohen* opinion thus instructs that a law of general applicability, which neither targets nor imposes disproportionate burdens upon the press, is enforceable against the press to the same extent that it is enforceable against individuals or organizations. The question remains whether the damages provisions of the Wiretapping Acts may constitutionally be applied to penalize individuals or organizations for disclosing material they know or have reason to know was illegally intercepted who had no part in the interception.

C.

In order to determine whether the provisions for civil sanctions from the Wiretapping Acts may constitutionally be applied to penalize defendants' disclosure, we must first decide what degree of First Amendment scrutiny should be applied.

The United States argues that the Federal Wiretapping Act is subject to intermediate rather than strict scrutiny. It bases this contention on two subsidiary assertions: (1) that these are "general law[s] that impose[ ] only incidental burdens on expression" and (2) that "to the extent that Title III restricts speech in particular cases, it does so in an entirely content-



neutral fashion." United States' Br. at 22. It states that "[a] statute satisfies intermediate scrutiny, if it furthers an important or substantial governmental interest, if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on speech is not unnecessarily great." United States' Br. at 11-12. We assume that the United States' arguments apply equally to the Pennsylvania Wiretapping Act, which is substantially similar to the Federal Wiretapping Act.

We first consider the United States' argument that the disclosure provisions of the Wiretapping Acts merit only intermediate scrutiny because they impose only incidental burdens on expression. In support, the United States cites a series of Supreme Court decisions, beginning with *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

O'Brien was arrested and convicted for burning his draft card on the steps of the South Boston Courthouse. On appeal, O'Brien argued that the federal law, making it an offense to "forge[ ], alter[ ], knowingly destroy[ ], knowingly mutilate[ ], or in any manner change[ ]. . . such [a] certificate," was unconstitutional. *Id.* at 370, 88 S.Ct. 1673 (italics omitted). The Court of Appeals for the First Circuit agreed that this provision unconstitutionally abridged the freedom of speech.

The Supreme Court, however, reversed. It opined that the statute "on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct." *Id.* at 375, 88 S.Ct. 1673.[1] The Supreme Court nonetheless recog-

[1] Respected commentators have taken issue with this holding in *O'Brien*. *See, e.g.*, Lawrence H. Tribe, *American Constitutional Law* § 312-6 at 824-25 (2d ed. 1988).

nized that O'Brien had burned his draft card as a form of protest against war. Assuming for the sake of argument that "the alleged communicative element in O'Brien's conduct [was] sufficient to bring into play the First Amendment," the Supreme Court held that the statute was still a permissible regulation. *Id.* at 376, 88 S.Ct. 1673. It reasoned that "when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." *Id.* The Court stated that such "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest." *Id.* at 377, 88 S.Ct. 1673.

In *O'Brien* and its progeny, the Supreme Court distinguished between "expressive conduct protected to some extent by the First Amendment" amid oral or written expression, which is fully protected by that amendment. *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). "[C]onduct that is intended to be communicative and that, in context, would reasonably he understood by the viewer to be communicative" is "[s]ymbolic expression," otherwise known as expressive conduct. *Id.* at 294, 104 S.Ct. 3065. The cases the United States cites in addition to *O'Brien* also focus on the permissibility of regulating expressive conduct. *See Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Indiana statute prohibiting complete nudity in public places); *Arcara v. Cloud Books, Inc.,* 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986) (New York statute authorizing closure of building found to be a public health nuisance); *United States v. Albertini,* 472 U.S. 675, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985) (federal statute making it unlawful to reenter a military base after having been barred by the commanding officer); *Clark,* 468 U.S. at 289, 104 S.Ct. 3065 (National Park Service regulation prohibiting camping in Lafayette Park); *cf R.A.V. v. City of St. Paul,* 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (Minnesota statute prohibiting display of certain objects, including a burning cross or Nazi swastika).



By citing this line of cases in support of its position that intermediate scrutiny applies here, the United States apparently suggests that defendants' actions in disclosing the contents of the Bartnicki-Kane conversation are properly considered "expressive conduct" rather than speech. If this is the thrust of the government's citations, it is not persuasive. The acts on which Bartnicki and Kane base their complaint are Yocum's "intentionally disclos[ing a] tape to several individuals and media sources"[3] and the media defendants' "intentionally disclos[ing] and publish[ing] to the public the entire contents of the private telephone conversation between Bartnicki and Kane." App. at 149. If the acts of "disclosing" and "publishing" information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.

We have no doubt that it is possible to identify some act by the media defendants in the course of preparing the broadcasts during which the tape was disclosed that falls within our ordinary understanding of the term conduct. However, this fact does not alter the analysis. The Supreme Court has observed, "It is possible to find some kernel of expression in almost every activity a person undertakes—for example,

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[3] The complaint also alleges that Yocum "obtained a tape of the surreptitiously recorded telephone conversation," App. at 149, but the complaint does not allege that the mere obtaining of the tape violates either statue.

walking down the street or meeting one's friends at a shopping mall—but such kernel is not sufficient to bring the activity within the protection of the First Amendment." *Barnes*, 501 U.S. at 570, 111 S.Ct. 2456 (quoting *Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989)). Similarly, although it may be possible to find some kernel of conduct in almost every act of expression, such kernel of conduct does not take the defendants' speech activities outside the protection of the First Amendment.

The United States nonetheless insists that intermediate scrutiny is appropriate because the statute, read as a whole, primarily prohibits conduct rather than speech. It notes that the prohibition in 18 U.S.C. § 2511(1)(d) against using or endeavoring to use intercepted material encompasses more than disclosure. The government asserts that it precludes, for example, a person or company from using intercepted material to develop a competing product, to craft a negotiating strategy, or to justify taking disciplinary action against an employee. United States' Br. at 22-23.

The government cites no support for the surprising proposition that a statute that governs both pure speech and conduct merits less First Amendment scrutiny than one that regulates speech alone. We are convinced that this proposition does not accurately state First Amendment law. A statute that prohibited the "use" of evolution theory would surely violate the First Amendment if applied to prohibit the disclosure of Charles Darwin's writings, much as a law that directly prohibited the publication of those writings would surely violate that Amendment.

Because the defendants' acts in this case—the disclosure and broadcast of information—contain no significant "non-speech" elements, we need not decide whether this statute could properly be subjected to lesser scrutiny if applied to prohibit "uses" that do involve such "non-speech" elements. We merely hold that, when a statute that regulates both



speech and conduct is applied to an act of pure speech, that statute must meet the same degree of First Amendment scrutiny as a statute that regulates speech alone.

The United States' second argument—that intermediate scrutiny applies because the Acts are content-neutral—is more persuasive.

When the state uses a "content-based" regulation to restrict free expression, particularly political speech, that regulation is subject to "the most exacting scrutiny." *Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988); *Phillips v. Borough of Keyport*, 107 F.3d 164, 172 (3d Cir.1997) (en banc). It will not be upheld unless the state can show that it "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Boos*, 485 U.S. at 321, 108 S.Ct. 1157; see also *Phillips*, 107 F.3d at 172 ("State regulations of speech that are not regarded as content neutral will be sustained only if they are shown to serve a compelling state interest in a manner which involves the least possible burden on expression.")

By contrast, when the state places a reasonable "content-neutral" restriction on speech, such as a time, place and manner regulation, that regulation need not meet the same high degree of scrutiny. "Content-neutral" restrictions are valid under the First Amendment provided that they "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of information."[4] *Clark*, 468 U.S. at 293, 104 S.Ct. 3065.

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[4] This standard is little different from that announced in *O'Brien* as governing conduct regulations that incidentally restrict expressive behavior. *See Clark*, 468 U.S. at 298, 104 S.Ct. 3065.

We recognize that an argument could be made that the Wiretapping Acts are content-based. Ordinarily, the distinction between permissible and impermissible regulation of speech depends on whether the law at issue regulates the substantive content of the speech (what is said) or whether it merely regulates the time, place, or manner of the speech (when, where, at what volume, and through which medium it is said). The former regulations are content-based while the latter are content-neutral. The essence of the distinction lies in the fact that, if the regulation were content-based, it would not be possible to determine whether a particular speech is prohibited without referring to the substantive import of that expression.

The United States contends that the Wiretapping Acts are not content-based even in the literal sense referred to above because the Acts define the content that is prohibited by reference to the manner in which the information was acquired, rather than to its subject matter or viewpoint. We suspect that the mere fact that a regulation defines the category of content that is prohibited by reference to its source rather than its subject matter is unlikely to be sufficient to justify treating the regulation as content-neutral. For example, one might argue that a ban on the publication of' information obtained through experimentation on human embryos would raise sufficient First Amendment concerns to merit heightened scrutiny, even if such experimentation were illegal.

The Supreme Court's decision in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct 925, 89 L.Ed2d 29 (1986), however, suggests that we are not limited to a literal interpretation of the phrase "content-neutral" but may determine whether speech is content-neutral or content-based with reference to the government's proffered justification for the restriction. In *Renton*, the Supreme Court described "content-neutral" speech restrictions as those that "are justified without reference to the content of the regulated speech." *Id.* at 48,



106 S.Ct. 925 (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)). We therefore turn to consider the purpose or purposes the Wiretapping Acts are meant to serve.

The Senate Report describes the purposes of the Federal Wiretapping Act as: "(1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may he authorized." S.Rep. No. 90-1097 (1968), *re-printed in* 1968 U.S.C.C.A.N. 2112, 2153. Congress thus focused on privacy in adopting 18 U.S.C. § 2511, the provision that prohibits the interception of wire, oral, or electronic communications, as well as the use or disclosure of the contents of illegally intercepted communications. Congress did not, however, define the privacy interest that it intended the Act to protect.

As commonly understood, the right to privacy encompasses both the right "to be free from unreasonable intrusions upon [one's] seclusion" and the right to be free from "unreasonable publicity concerning [one's] private life." *Fultz v. Gilliam*, 942 F.2d 396, 401 (6th Cir.1991); *see also Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977); *Paul P. v. Verniero*, 170 F.3d 396 (3d Cir.1999). The Sixth Circuit has opined that "[t]he prohibitions Congress incorporated into section 2511(1) of Title III protect both these interests first, by prohibiting the surreptitious interception of private communications in the first instance—a highly offensive physical intrusion on the victim's private affairs—and second, by circumscribing the dissemination of private information so obtained." *Fultz*, 942 F.2d at 401 (footnote omitted). The First Circuit has similarly suggested that by enacting Title III Congress recognized "that the invasion of privacy is not over when the interception occurs but is compounded by disclosure." *Providence Journal Co. v. FBI*, 602 F.2d 1010, 1013

(1st Cir.1979); *see also Fultz,* 942 F.2d at 402 ("Each time the illicitly obtained recording is replayed to a new and different listener, the scope of the invasion widens and the aggrieved party's injury is aggravated.").

We have no doubt that the state has a significant interest in protecting the latter privacy right—the right not to have intimate facts concerning one's life disclosed without one's consent. That right is a venerable one whose constitutional significance we have recognized in the past. *See Paul P.,* 170 F.3d at 401-02 (collecting cases). We also have no doubt that the prohibition on using or disclosing the contents of an illegally intercepted communication serves that interest by deterring the publicization of private facts.

We are less certain, however, that the desire to protect the privacy interest that inheres in private facts is a content-neutral justification for restricting speech. The Supreme Court has instructed that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 134, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992); *accord Lind v. Grimmer,* 30 F.3d 1115, 1117 (9th Cir.1994) ("Because the[] concerns [addressed by the statute] all stem from the direct communicative impact of speech, we conclude that section 11-216(d) regulates speech on the basis of its content.") As Justice O'Connor explained in *Boos.* "[r]egulations that focus on the direct impact of speech on its audience"—the speech's "primary effects"—are not properly treated as content-neutral under *Renton.* 485 U.S. at 321, 108 S.Ct. 1157 (Opinion of O'Connor, J.).

Although the defendants do not argue that the regulations at issue are content-based, there is a not implausible argument that the injury associated with the disclosure of private facts stems from time communicative impact of speech that contains those facts, i.e. having others learn information about which one wishes they had remained ignorant. Thus, under the Supreme Court's jurisprudence, the injury associated with



such disclosure constitutes a "primary effect" of the disfavored speech, rather than a "secondary effect." This reasoning might suggest that a statute that regulated expression for the purpose of protecting the right not to have private facts disclosed without permission would be subject to strict scrutiny as a content-based regulation.

We do not decide whether the Wiretapping Acts would indeed be properly categorized as content-based if justified on the basis of a need to prevent the disclosure of private facts because the United States for the most part eschews reliance on that justification in explaining the purpose of those acts. Instead, the United States argues that "the fundamental purpose of Title III is to maintain the confidentiality of wire, electronic, and oral communications." United States Br. at 33. It reasons that "prohibiting the use of illegally intercepted communication . . . 'strengthen[s] subsection (1)(a),' the provision that imposes the underlying ban on unauthorized interception, 'by denying the wrongdoer the fruits of his labor' and by eliminating the demand for those fruits by third parties." United States' Br. at 33. We are satisfied that this latter justification does not rely on the communicative impact of speech and, therefore, that the Acts are properly treated as content-neutral.

D.

Accordingly, we adopt the government's position that we should apply intermediate scrutiny in our analysis of the issue before us. In doing so, we must first fix upon an acceptable definition of the term "intermediate scrutiny." [4] Intermediate

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[4] In a recent article, the author uses the term " 'intermediate scrutiny' " to refer to a test that requires a state interest which is greater than legitimate but less than compelling and a fit between means and end that is not necessarily narrowly tailored but has more than just an incidental connection." Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism,* 66 Geo. Wash L.Rev. 298, 300 n. 15(1998).

scrutiny is used by the Court in a wide variety of cases calling for some balancing. Thus, intermediate scrutiny has been applied to statutes that discriminate on the basis of gender. *See Craig v. Boren*, 429 U.S. 190, 200, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (holding that prohibiting sale of 3.2% beer to males under 21 and females under 18 did not "closely serve" goal of promoting traffic safety). It is the review standard used to examine whether an even-handed regulation promulgated for a legitimate public interest violates the dormant Commerce Clause. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970) (describing balancing test for state regulation); *Southern Pac. Co. v. Arizona ex rel Sullivan*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945) (invalidating limit on train length as not "plainly essential" to further state interest in safety). And in the First Amendment context, intermediate scrutiny has been applied to commercial speech cases, *see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.*, 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) (establishing four-part test for commercial speech regulation), and to examine the validity of time, place, and manner regulations, *see United States v. Grace*, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (invalidating statute prohibiting displaying flag, banner or device in Supreme Court building or on its grounds).

Admittedly, the intermediate scrutiny test applied varies to some extent from context to context, and case to case. But it always encompasses some balancing of the state interest and the means used to effectuate that interest. And despite the frequent tendency to assume that regulations that are reviewed under less exacting scrutiny than strict scrutiny will be upheld, each of the cases referred to above as applying intermediate scrutiny held that the regulation in question was unconstitutional. The reasons varied. Sometimes, the Court held the asserted government interest insufficient to justify an expansive prohibition and noted the government failed to



demonstrate that a lesser prohibition would not adequately serve its purpose. *See, e.g., Schneider v. State*, 308 U.S. 147, 162, 60 S.Ct. 146, 84 L.Ed. 155 (1939) (holding that state interest in preventing littering did not justify ban on leafletting); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 636, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) (invalidating prohibition on charitable solicitations for certain charities as too destructive of First Amendment interests). Other times, the Court held the government failed to show that the challenged regulation substantially served the asserted government interest. *See, e.g., Grace*, 461 U.S. at 182, 103 S.Ct. 1702. It should also be noted that in making the examination into whether the means chosen were those appropriate to the government interest, the Court has not always made a distinction between its analysis for purposes of intermediate scrutiny and for strict scrutiny. *See e.g., Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) (invalidating candidate registration statute because voters' associational and voting rights outweighed state interest).

The test usually applied in First Amendment cases to content-neutral regulation requires an examination of whether the regulation is "narrowly tailored to serve a significant governmental interest" and "leave[s] open ample alternative channels for communication." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). There is a considerable number of First Amendment cases in which the Supreme Court, applying intermediate scrutiny, has found that the regulation at issue, albeit designed to advance legitimate state interests, failed to withstand that scrutiny. A review of illustrative cases provides some indication of the Court's analytic approach in such instances.

In *Schneider*, the Court recognized that there is a legitimate government interest in preventing street littering but

nevertheless found that "the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it." 308 U.S. at 162, 60 S.Ct. 146.

The Court termed the burden imposed on the cities in cleaning and caring for the streets "an indirect consequence of such distribution," and one that resulted from the "constitutional protection of the freedom of speech and press." *Id.* The Court continued, in language significant for this case, "[t]here are obvious methods of preventing littering. Amongst these is *the punishment of those who actually throw paper on the streets.*" *Id.* (emphasis added).

Similarly, in *Village of Schaumburg*, the Court recognized that the government had a substantial interest in protecting the public from fraud, crime and undue annoyance, but held that the proffered interest, which the government sought to accomplish by an ordinance that prohibited the solicitation of contributions by charitable organizations that did not use at least 75% of their receipts for "charitable purposes," was "only peripherally promoted by the 75-percent requirement and could be sufficiently served by measures less destructive of First Amendment interests." 444 U.S. at 636, 100 S.Ct. 826.

Both *Schneider* and *Schaumburg* were cited by the Court in a later case to illustrate "the delicate and difficult task [that] falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of [First Amendment] rights." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 70, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) (quoting *Schneider*, 308 U.S. at 161, 60 S.Ct. 146). In *Schad*, the Court invalidated a zoning ordinance that excluded live entertainment, including nude dancing, throughout the borough after finding that the borough "ha[d] not adequately justified its substantial



restriction of protected activity." *Id.* at 72, 101 S.Ct. 2176. Justice Blackmun's concurring opinion makes clear that the burden to "articulate, and support, a reasoned and significant basis" for the governmental regulation should not be viewed as de minimis, even when the regulation is subjected to intermediate scrutiny. *Id.* at 77, 101 S.Ct. 2176; *see also* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L.Rev. 46, 52-53 (1987) (describing intermediate scrutiny as a test that "takes seriously the inquiries into the substantiality of the governmental interest and the availability of less restrictive alternatives.").

With the Supreme Court precedent as a guide, we examine whether the government has shown that its proffered interest is sufficiently furthered by application to these defendants of the damages provisions of the Wiretapping Acts to justify the impingement on the protected First Amendment interests at stake.

As noted above, the United States contends that the Wiretapping Acts serve the government's interest in protecting privacy by helping "maintain the confidentiality of wire, electronic, and oral communications." United States' Br. at 33. Undoubtedly, this is a significant state interest. We do not understand the defendants to deny that there is an important governmental interest served by the Wiretapping Acts. However, the government recognizes that not all of the provisions of the Wiretapping Acts are being challenged. In fact, only a portion of those Acts are at issue here—the provisions imposing damages and counsel fees for the use and disclosure of intercepted material on those who played no part in the interception.

The United States asserts that these provisions protect the confidentiality of communications in two ways: (1) "by denying the wrongdoer the fruits of his labor" and (2) "by eliminating the demand for those fruits by third parties." United States' Br. at 33. In this case, however, there is no question

of "denying the wrongdoer the fruits of his labor." The record is devoid of any allegation that the defendants encouraged or participated in the interception in a way that would justify characterizing them as "wrongdoers." Thus, the application of these provisions to penalize an individual or radio stations who did participate in the interception and thereafter disclosed the intercepted material is not before us.

We therefore focus on the United States' second contention—that the provisions promote privacy by eliminating the demand for intercepted materials on the part of third parties. The connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception is indirect at best. The United States has offered nothing other than its *ipse dixit* in support of its suggestion that imposing the substantial statutory damages provided by the Acts on Yocum or the media defendants will have any effect on the unknown party who intercepted the Bartnicki-Kane conversation. Nor has the United States offered any basis for us to conclude that these provisions have deterred any other would-be interceptors.[5] Given the indirectness of the manner in which the United States claims the provisions serve its interest, we are not prepared to accept the United States' unsupported allegation that the statute is likely to produce the hypothesized effect. *See Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 841, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978) ("The Commonwealth has offered little

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[5] As the Supreme Court recently emphasized in invalidating a prohibition on the receipt of honoraria by government employees, "[w]hen the government defends a regulation on speech . . . it must do more than simply 'posit the existence of the disease sought to be cured'. . . It must demonstrate that the recited harms are real, not merely conjectural, and *that the regulation will in fact alleviate these harms in a direct and material way.*" *United States v. National Treasury Employees Union,* 513 U.S. 454, 475, 115 S.Ct 1003, 130 L.Ed.2d 964 (1995) (citation and internal quotation omitted) (emphasis added).



more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would he seriously undermined."). Faced with nothing "more than assertion and conjecture," it would be a long stretch indeed to conclude that the imposition of damages on defendants who were unconnected with the interception even "peripherally promoted" the effort to deter interception. *See Village of Schaumburg,* 444 U.S. at 636, 100 S.Ct. 826.

> When the state seeks to effectuate legitimate state interests, it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. *Hynes v. Mayor of Oradell,* 425 U.S. at 620, 96 S.Ct. 1755; *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 786, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone...." *NAACP v. Button,* 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) (citations omitted).

*Village of Schaumburg.* 444 U.S. at 637, 100 S.Ct. 826.

In *Village of Schaumburg,* the Court stated that the Village's legitimate interest in preventing fraud could be better served by requiring solicitors to inform the public of the uses made of their contributions, than by prohibiting solicitation. *Id.* Similarly, in *Martin v. Struthers,* 319 U.S. 141, 147-48, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), the Court held that in lieu of a complete prohibition of door-to-door solicitation, with its draconian impact on First Amendment values, the City could have used the less restrictive means of punishing those who trespass "in defiance of the previously expressed will of the occupant." Indeed, the Wiretapping Acts already provide for punishment of the offender, i.e., the individual who intercepted the wire communication and who used or disclosed it. *See Schneider,* 308 U.S. at 162, 60 S.Ct. 146 (city should prevent littering by punishing litterers, not by prohibiting

leafleting). Those who indirectly participated in the interception, either by aiding or abetting, would also fall within the sanctions provided by the statute. Therefore, the government's desired effect can be reached by enforcement of existing provisions against the responsible parties rather than by imposing damages on these defendants.

We are also concerned that the provisions will deter significantly more speech than is necessary to serve the government's asserted interest. It is likely that in many instances these provisions will deter the media from publishing even material that may lawfully be disclosed under the Wiretapping Acts.

Reporters often will not know the precise origins of information they receive from witnesses and other sources, nor whether the information stems from a lawful source. Moreover, defendants argue that they cannot be held liable for use and publication of information that had previously been disclosed. Assuming this is so, reporters may have difficulty discerning whether material they are considering publishing has previously been disclosed to the public. Such uncertainty could lead a cautious reporter not to disclose information of public concern for fear of violating the Wiretapping Acts.

Bartnicki and Kane recognize that the Supreme Court has frequently expressed concern about the "timidity and self-censorship" that may result from permitting the media to be punished for publishing certain truthful information. *See, e.g., Florida Star,* 491 U.S. at 535, 109 S.Ct. 2603; *Cox Broadcasting,* 420 U.S. at 496, 95 S.Ct. 1029. The public interest and newsworthiness of the conversation broadcast and disclosed by the defendants are patent. In the conversation, the president of a union engaged in spirited negotiations with the School Board suggested "blow[ing] off [the] front porches" of the School Board members. Nothing in the context suggests that this was said in anything other than a serious vein. Certainly, even if no later acts were taken to follow through



on the statement, and hence no crime committed, the fact that the president of the school teachers' union would countenance the suggestion is highly newsworthy and of public significance. Our concerns are only heightened by the Supreme Court's admonition in *Smith* that "state action to punish the publication of truthful information seldom can satisfy constitutional standards." 443 U.S. at 102, 99 S.Ct. 2667.

Our dissenting colleague does not disagree with any of the applicable legal principles. He candidly states that the difference between us is one of "ultimate application of [the agreed upon] analysis to the case at bar." Dissenting Op. at 130. Therefore, we add only a few brief comments pertaining to that application.

Evidently, one of the principal differences between our respective applications lies in the weight we give the factors to be balanced. The dissent suggests the Supreme Court's decisions in *Schneider, Struthers,* and *Schaumburg* are not pertinent to this case because the state interests in those cases (littered streets, annoying door-to-door proselytizers,[6] and fraudulent charitable solicitors, respectively) were "not very important." The dissent contrasts those interests with the significant governmental interest at issue here—that of maintaining the confidentiality of wire, electronic, and oral communications.

Presumably, the dissent's point is that we must weigh more heavily the privacy interests furthered by the Wiretapping Acts than the Court weighed the state interests in the three cited cases. Given the conceded importance of privacy and confidentiality at issue here, we nonetheless find it difficult to accord it more weight than the interests in preventing disclosure of the name of a rape victim, the identity of a judge in a

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[6] The dissent fails to mention that one of the purposes for the ordinance referred to by the Court in *Struthers* was crime prevention. *See* 319 U.S. at 144-45, 63 S.Ct. 862.

putative disciplinary proceeding, or the identity of a youth charged as a juvenile offender at issue in *Cox Broadcasting, Landmark Communications* and *Smith,* respectively. Yet when faced with each of those circumstances, the Supreme Court determined that despite the strong privacy interest underlying the statutory and state constitutional provisions punishing disclosure of such information, the interests served by the First Amendment must take precedence.[7] It would be difficult to hold that privacy of telephone conversations are more "important" than the privacy interests the states unsuccessfully championed in those cases.

In addition, we do not share the dissent's confidence that imposition of civil liability on those who neither participated in nor encouraged the interception is an effective deterrent to such interception. The dissent finds such a nexus in the legislative landscape, where half of the states that prohibit wiretapping also authorize civil damage actions. With due respect, we find this a slim reed, not only because it appears from the dissent's statistics that the other half of the states with wiretapping statutes have not included a damage provision but because the incidence of state statutes, and hence "widespread legislative consensus," does not prove the deterrent effect of the prohibition. Indeed, there is not even general agreement as to the deterrent effect of a criminal statute on the perpetrator,[8] much less on those who were not in league

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[7] Although we acknowledge that those decisions arose from a stricter level of scrutiny than we employ here and somewhat different circumstances, the fact remains that the Court has generally tilted for the First Amendment in the tension between press freedom and privacy rights. This is bemoaned by the dissenting Justices in *The Florida Star,* who state candidly they "would strike the balance rather differently." 491 U.S. at 552, 109 S.Ct. 2603 (White, J., dissenting). So, apparently, would the dissent in this case.

[8] The opposing views of deterrence were noted in connection with capital punishment in Chief Justice Burger's dissenting opinion in *Furman v. Georgia,* 408 U.S. 238, 395-96, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).



with the perpetrator. In determining whether a regulation that restricts First Amendment rights "substantially serves [its asserted] purposes," *see Grace,* 461 U.S. at 182, 103 S.Ct. 1702, the Court has never found that question satisfied by sheer numbers of state statutes.

The dissent engages in hyperbole when it suggests that our decision "invalidates a portion of the federal statute" and "by necessary implication spells the demise of a portion of more than twenty other state statutes." Dissenting Op. at 134. The statutes, which are designed to prohibit and punish wiretapping, remain unimpaired. All that is at issue is the application of those statutes to punish members of the media who neither encouraged nor participated directly or indirectly in the interception, an application rarely attempted.

Moreover, we do not agree that the recent decision in *Boehner v. McDermott,* 191 F.3d 463 (D.C.Cir.1999), presented that court with the same issue presented here. Most particularly, in *Boehner,* where a divided court upheld the constitutionality of § 2511(1)(c), all three judges emphasized in their separate opinions that there was no effort to impose civil damages on the newspapers (The New York Times, *et al.)* which had printed the details of a conversation that been [sic] illegally intercepted. Thus, for example, in the lead opinion the court stated at the outset, "[n]or should we be concerned with whether § 2511(1)(c) would be constitutional as applied to the newspapers who published the initial stories about the illegally-intercepted conference call." *Id.* at 467. Liability in that case was sought to be imposed on James McDermott, a congressman who caused a copy of the tape to be given to the newspapers. Although technically, defendant Yocum in our case stands in the same position as McDermott,

i.e. as the source but not the interceptor, there is an indication in *Boehner* that McDermott was more than merely an innocent conduit. Indeed, McDermott, unlike Yocum, knew who intercepted the conversation because he "accepted" the tape from the interceptors and, the opinion suggests, not only sought to embarrass his political opponents with the tape but also promised the interceptors immunity for their illegal conduct. *Id.* at 475-76. In fact, the second judge, who concurred in the judgment and in only a portion of the opinion for the court, specifically limited his concurrence to the decision that § 2511(1)(c) "is not unconstitutional *as applied in this case,*" *id.* at 478 (emphasis added), and pointed out that "McDermott knew the transaction was illegal at the time he entered into it," *id.* at 479. In contrast, Yocum has not been shown to have "entered into" any transaction with the interceptors. In the posture of this case, all parties accept his allegation that the tape was left in his mailbox.

The *Boehner* court was acutely aware that no court has yet held that the government may punish the press through imposition of damages merely for publishing information of public significance because its original source acquired that information in violation of a federal or state statute. *Cf. Landmark,* 435 U.S. at 837, 98 S.Ct. 1535 (finding it unnecessary to adopt categorical approach). As noted earlier in this opinion, the Supreme Court has been asked to permit a state to penalize the publication of truthful information in at least four instances. In three of the four cases, the statutes at issue protected the privacy interests of such vulnerable individuals as juveniles and the victims of sexual assault. *See Florida Star,* 491 U.S. at 526, 109 S.Ct. 2603; *Smith,* 443 U.S. at 98, 99 S.Ct. 2667; *Cox Broadcasting,* 420 U.S. at 472, 95 S.Ct 1029. In the remaining case, the statute at issue was meant to protect the state's interest in an independent and ethical judiciary. *See Landmark,* 435 U.S. at 830, 98 S.Ct. 1535. Despite the strength of the state interests asserted, the Supreme Court



in each case concluded that those interests were insufficient to justify the burdens imposed on First Amendment freedoms.

We likewise conclude that the government's significant interest in protecting privacy is not sufficient to justify the serious burdens the damages provisions of the Wiretapping Acts place on free speech. We are skeptical that the burden these provisions place on speech will serve to advance the government's goals. Even assuming the provisions might advance these interests, the practical impact on speech is likely to be "substantially broader than necessary." *Ward v. Rock Against Racism,* 491 U.S. 781, 800, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

We therefore hold that the Wiretapping Acts fail the test of intermediate scrutiny and may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception. It follows that we need not decide whether these provisions leave open ample alternative channels for communication of information.

III.

## CONCLUSION

For the reasons set forth, we will reverse the order of the District Court denying summary judgment to the defendants, and will remand with directions to grant that motion.

POLLAK, District Judge, dissenting.

The Court of Appeals for the District of Columbia Circuit has recently determined, in *Boehner v. McDermott,* 191 F.3d 463 (D.C.Cir.1999), that the First Amendment does not bar a a civil damage action brought, pursuant to 18 U.S.C. § 2511(1)(c) and 18 U.S.C. § 2520(a), and pursuant to the Florida statutory provisions that are counterparts of the federal statute, against one who, so the plaintiff alleged, gave to

the *New York Times* and other newspapers copies of a tape recording of a telephone conversation which the defendant had "knowledge and reason to know" had been unlawfully intercepted.[1] Today this court holds that the First Amendment

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[1] In *Boehner v. McDermott*, the plaintiff, John Boehner, is a Republican Representative who, together with other members of the Republican leadership of the House of Representatives (including then Speaker Gingrich), was in 1996 party to a conference telephone call that was unlawfully intercepted by persons equipped with a radio scanner. According to Representative Boehner's complaint, the interceptors turned over the tape to James A. McDermott, a Democratic Representative who was at the time the ranking minority member of the House Ethics Committee; Representative McDermott in turn gave copies of the tape to the *New York Times* and other newspapers; and the *New York Times* promptly published part of the taped conversation. Representative Boehner sued Representative McDermott, but did not sue the *New York Times* or any other newspaper. The district court dismissed Representative Boehner's complaint on First Amendment grounds. The circuit court reversed.

The circuit court perceived a potentially important distinction between Representative McDermott's First Amendment claim and the First Amendment claim that might have been made by the *New York Times* or another newspaper, if a newspaper had been named as a defendant. Identifying that potential distinction, the court was at pains to confine its analysis to Representative McDermott's claim:

> McDermott's liability under § 2511(1)(c) rests on the truth of two allegations: that he "caused a copy of the tape" to be given to the newspapers; and that he "did so intentionally and with knowledge and reason to know that the recorded phone conversation had been illegally intercepted (as the cover letter on its face disclosed)." Complaint ¶ 20. Although the circumstances of McDermott's transactions with the newspapers, including who said what to whom, may become evidence at trial, it is his conduct in delivering the tape that gives rise to his potential liability under § 2511(1)(c). McDermott's behavior in turning over the tapes doubtless conveyed a message, expressing something about him. All behavior does. But not all behavior comes within the First Amendment.
>
> "[E]ven on the assumption that there was [some] communicative element in" McDermott's conduct, the Supreme Court has held that "when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct 1673, 20 L.Ed.2d 672 (1968). The *O'Brien* framework is the proper mode of First Amendment analysis in this ease. McDermott's challenge is only to the statute as it applies to his delivery of the tape to newspapers. Whether a different analysis would govern if, for instance, McDermott violated § 2511(l)(c) by reading a transcript of the tape in a news conference, is therefore a question not presented here Nor should we be concerned with whether § 2511(1)(c) would be constitutional as applied to the newspapers who published the initial stories about illegally-intercepted conference call. The focus must be on McDermott's activity and on his activity alone.

191 F.3d at 467.



does bar a civil damage action brought, pursuant to the Federal statute and its Pennsylvania counterpart, against (1) one who handed over a copy of a taped telephone conversation to a radio reporter, and (2) the radio reporter and the two radio stations that subsequently broadcast the tape, plaintiffs having alleged that both the person who handed over the tape and the radio reporter had, in the statutory language, "reason to know" that the taped conversation had been intercepted in contravention of the federal and Pennsylvania statutes. In the case decided today the court addresses a broader range of issues then [sic] those presented in *Boehner v. McDermott:* in *Boehner v. McDermott* the only defendant was the person who allegedly delivered to the media a copy of a tape of an allegedly wrongfully intercepted telephone conversation; in today's case there are three "media defendants" in addition to the defendants who allegedly delivered to the media a copy of

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The author of the court's opinion was Judge Randolph. Judge Ginsburg filed a concurring opinion, joining part (including the paragraphs just quoted) of Judge Randolph's opinion. Judge Santelle filed a dissenting opinion.

a tape of an allegedly wrongfully intercepted telephone conversation.[2]

I am in general agreement with the careful analytic path traced by the court through the minefield of First Amendment precedents. However, I find myself in disagreement with the court's ultimate application of its analysis to the case at bar. Accordingly, I respectfully dissent.[3]

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[2] The *Boehner v. McDermott* court was at pains to point out the limited scope of its ruling. *See* note 1, *supra*. *See also* note 3, *infra*.

[3] Although I have expressed general agreement with the court's analytic approach. I should note one aspect of the analysis on which I differ with the court. That aspect is cogently illustrated by the distinction the *Boehner v. McDermott* court drew between the First Amendment posture of Representative McDermott and the potential First Amendment posture of a newspaper that published (as the *New York Times* in fact did) a portion of the intercepted telephone conference call, had such a newspaper been sued. As the *Boehner v. McDermott* excerpt quoted in footnote 1, *supra*, makes clear, the court was doubtful that Representative McDermott's action in giving copies of the tape to newspapers was itself "speech" in the full First Amendment sense. Judge Randolph, speaking for the court, saw Representative McDermott's First Amendment claim as cabined by the Supreme Court's holding in *United States v. O'Brien*, 391 U.S 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."

In the case at bar, in which the plaintiffs have sued both Yocum and media defendants, the United States argues that the approach reflected in *O'Brien* and cases that follow it is appropriate to the entire case. The court rejects that view. I find the *Boehner v. McDermott* exposition of Representative McDermott's limited First Amendment posture persuasive, and thus in the case at bar I would apply the *O'Brien* approach to defendant Yocum—whose role, from a First Amendment perspective, seems analogous to that of Representative McDermott—while rejecting *O'Brien* as the proper approach to the First Amendment claims of the media defendants. However, the distinction is not one that I need pursue, because, accepting for the purposes of the case at bar the court's comprehensive



I.

I agree with the court's statement of the case. And I agree with the court's determination that the challenged federal and Pennsylvania wiretapping statutes—here invoked by plaintiffs seeking damages for defendants' alleged disclosure and use of a taped telephone conversation of plaintiffs that defendants allegedly had "reason to know" was the product of a prohibited "interception of a wire . . . communication," 18 U.S.C. § 2511(c); 18 Pa. Cons.Stat. § 5703(2)—are "content neutral." I further agree with the court that the proper standard to be applied in testing the constitutionality of the federal and Pennsylvania statutes as here applied is "intermediate scrutiny." Finally, I agree with the court that intermediate scrutiny "always encompasses some balancing of the state interest and the means used to effectuate that interest." Op., p. 124. Concretely, such scrutiny calls for judicial assessment of whether the challenged regulation is "narrowly tailored to serve a significant governmental interest." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).[4]

Where I part company with the court is in its application of intermediate scrutiny in this case.

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rejection of *OBrien*, I nevertheless wind up disagreeing with the court on how the court's analytic approach plays out as applied, with the result that I conclude that liability in damages could constitutionally have been imposed both on Yocum and on the media defendants if the plaintiffs had been permitted to take their case to trial and had proved their allegations to the satisfaction of the fact-finder.

[4] The other criterion identified in *Clark v. Community for Creative Non-Violence*—namely, whether the challenged regulation "leave[s] open ample alternative channels for communication of the information" 468 US at 293, 104 S.Ct. 3065—is not pertinent to the case at bar because the challenged statutes are not, as the challenged regulations in *Clark v. Community for Creative Non-Violence* were deemed to be, "time, place or manner restrictions." *Ibid.* And see *id.* at 295, 104 S.Ct 3065.

A.

The court begins by acknowledging what I take to be beyond dispute: namely, that the professed governmental interest—the interest of the United States (which is presumably also Pennsylvania's interest) in "maintain[ingl the confidentiality of wire, electronic, and oral communications," Brief for the United States, p. 33—is "a significant state interest." Op., *supra,* p. 125. Then—evidently with a view to exploring whether the challenged prohibition on disclosure or use of a conversation by one who had "reason to know" that the conversation was intercepted unlawfully is "narrowly tailored to serve [that] significant governmental interest"—the court undertakes to "focus on the United States' . . . contention . . . that the provisions promote privacy by eliminating the demand for intercepted materials on the part of third parties." Op., p. 125. The court then proceeds as follows:

> The connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception is indirect at best. The United States has offered nothing other than its *ipse dixit* in support of its suggestion that imposing the substantial statutory damages provided by the Acts on Yocum or the media defendants will have any effect on the unknown party who intercepted the Bartnicki-Kane conversation. Nor has the United States offered any basis for us to conclude that these provisions have deterred any other would-be interceptors. Given the indirectness of the manner in which the United States claims the provisions serve its interest, we are not prepared to accept the United States' unsupported allegation that the statute actually produces the hypothesized effect. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978) ("The Commonwealth has offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined."). Faced with nothing "more than assertion and conjecture," it would be a long stretch indeed to conclude that the imposition of damages on defendants who were unconnected with the interception even "peripherally promoted" the effort to deter interception. *See Village of Schaumburg*, 444 U.S. at 636, 100 S.Ct. 826.



When the state seeks to effectuate legitimate state interests, it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. *Hynes v. Mayor of Oradell,* 425 U.S. at 620, 96 S.Ct. 1755; *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 786, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touch-stone. . . ." *NAACP v. Button,* 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) (citations omitted).

*Village of Schaumburg,* 444 U.S. at 637, 100 S.Ct. 826.

> In *Village of Schaumburg,* the Court stated that the Village's legitimate interest in preventing fraud could be better served by requiring solicitors to inform the public of the uses made of their contributions, than by prohibiting solicitation. *Id.* Similarly, in *Martin v. Struthers*, 319 U.S. 141, 147-48, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), the Court held that in lieu of a complete prohibition of door-to-door solicitation, with its draconian impact on First Amendment values, the City could have used the less restrictive means of punishing those who trespass "in defiance of the previously expressed will of the occupant." Indeed, the Wiretapping Acts already provide for punishment of the offender, i.e., the individual who intercepted the wire communication and who used or disclosed it. *See Schneider,* 308 U.S. at 162, 60 S.Ct. 146 (city should prevent littering by punishing litterers,

not by prohibiting leafleting). Those who indirectly participated in the interception, either by aiding or abetting, would also fall within the sanctions provided by the statute. Therefore, the government's desired effect can be reached by enforcement of existing provisions against the responsible parties rather than by imposing damages on these defendants.

Op. p. 125-27.

With all respect, I find this portion of the court's opinion unpersuasive:

*First:* I take issue with the proposition that "[t]he connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception is indirect at best." "[P]reventing the initial interception" is only part of the statutory scheme. The statutory purposes, as the court has noted, are "(1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S.Rep. No. 90-1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2153. Unauthorized interception of a communication is prohibited—and made both a criminal offense and an event giving rise to civil liability—both to protect parties to a communication from an initial trespass on their privacy and to protect them from subsequent disclosure (and/or other detrimental use). "Unless disclosure is prohibited, there will be an incentive for illegal interceptions; and unless disclosure is prohibited, the damage caused by an illegal interception will be compounded. It is not enough to prohibit disclosure only by those who conduct the unlawful eavesdropping. One would not expect them to reveal publicly the contents of the communication; if they did so they would risk incriminating themselves. It was therefore 'essential' for Congress to impose upon third parties, that is, upon those not responsible for



the interception, a duty of non-disclosure." *Boehner v. McDermott*, 191 F.3d at 470.

*Second:* Given the close nexus between the legislative prohibition on unauthorized interception and the legislative imposition upon "third parties, that is, upon those not responsible for the interception, [of] a duty of non-disclosure," I am puzzled by the court's view that the argument presented by the United States in support of the statutory regime of civil liability lacks persuasiveness because it is not supported by a demonstration that "imposing the substantial statutory damages provided by the Acts on Yocum or the media defendants will have any effect on the unknown party who intercepted the Bartnicki-Kane conversation," or "that these [statutory] provisions have deterred any other would-be interceptors." Nor do I think the court's view is buttressed by the court's invocation of *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978). It is true that in *Landmark*, in which the Supreme Court struck down, as applied to a newspaper, a statute making it a misdemeanor to "divulge information" about confidential proceedings conducted by Virginia's Judicial Inquiry and Review Commission, the Court observed that "[t]he Commonwealth has offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme [which contemplated a process of confidential inquiry into alleged judicial misconduct] would be seriously undermined." But the special—and limited—pertinence of the Court's observation becomes clear when it is read in context. The full paragraph follows:

> It can be assumed for purposes of decision that confidentiality of Commission proceedings serves legitimate state interests. The question, however, is whether these interests are sufficient to justify the encroachment on First Amendment guarantees which the imposition of criminal sanctions entails with respect to nonparticipants

> such as Landmark. The Commonwealth has offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined. While not dispositive, we note that more than 40 States having similar commissions have not found it necessary to enforce confidentiality by use of criminal sanctions against nonparticipants.

435 US. at 841, 98 S.Ct. 1535. In striking contrast is the legislative landscape that forms the setting of the case at bar. Complementing the federal statute are more than forty state wiretapping statutes. Of these state statutes, approximately half have provisions which, like the federal statute, (1) prohibit disclosure or use of an intercepted conversation by one who knows or has "reason to know" that the interception was unlawful, and (2) authorize civil damage actions against one who discloses or uses such unlawful interception. As this case illustrates, Pennsylvania is one of those states. So are Delaware and New Jersey—Pennsylvania's Third Circuit siblings. See 11 Del.Code Ann., § 1336 (1996); N.J. Stat. Ann. §§ 2A-156-A-3; 2A-156-A-24 (West 1985 & Supp. 1999). Listed in footnote 5 are the other state statutes that closely parallel the provisions of the federal and Pennsylvania legislation challenged by defendants in the case at bar.[5]

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[5] Fla. Stat. Ann. §§ 934.03, 812.15; Haw. Rev.Stat. §§ 803-42(a)(3), 803-48; Idaho Code §§ 18-6702, 18-6709; 720 Ill. Comp. Stat. Ann. 5/14-2, 5/14-6; Iowa Code §§ 808B.2(l)(c), 808B.8; La.Rev.Stat. Ann. §§ 15:1303 A(3), 15:1312; Md. Code Ann. §§ 10-402(a)(2), 10-410; Mich. Comp. Laws Ann. §§ 750.539e, 750.539h; Minn. Stat. Ann. §§ 626A.02(c), 626A.13; Neb.Rev.Stat. §§ 86-702; N.H.Rev.Stat. Ann. §§ 570-A:2, 570-A:11; N.C Gen.Stat. §§ 15A-287, 15A-296; Ohio Rev.Codc Ann. §§ 2933.52, 2933.65; Tenn.Code Ann. §§ 39-13-601, 39-13-603; Utah Code Ann. §§ 77-23a-4, 77-23a-11; Va. Code Ann. §§ 19.2-62, 19.2-69; W. Va.Code §§ 62-ID-3, 62-ID-12; Wis. Stat. § 968.31; Wyo. Stat Ann. §§ 7-3-602, 7-3-609; See also D.C. Code Ann. §§ 23-542, 23-554.



In short, there appears to be a widespread legislative consensus that the imposition of civil liability on persons engaged in conduct of the kind attributed to these defendants is an important ingredient of a regime designed to protect the privacy of private conversations. Moreover, the decision announced today not only invalidates a portion of the federal statute and the counterpart portion of the Pennsylvania statute, it by necessary implication spells the demise of a portion of more than twenty other state statutes (and also of a statute of the District of Columbia); in the two centuries of our constitutional history there cannot have been more than a handful of prior decisions, either of a federal court or of a state court, which, in the exercise of the awesome power of judicial review, have cut so wide a swath.

*Third:* What has been said points up the non-pertinence to the case at bar of *Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939), *Martin v. Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), and *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980), cases cited by the court as illustrative of the proposition that regulations designed to promote significant governmental interests should not sweep so broadly as to impose unnecessary constraints on First Amendment rights of free expression and communication. The constitutional shortcomings in *Schneider* (combating the littering of streets by curbing leafleting), *Struthers* (banning door-to-door distribution of circulars, including religious literature, in order to protect homeowners from annoyance), and *Village of Schaumburg* (combating allegedly fraudulent charitable solicitation by banning all solicitation by groups not disbursing 75% of receipts) involved situations in which small towns imposed on traditional First Amendment activi-

ties pervasive constraints sought to be justified as ways of dealing with distinct (and not very important) problems that could have been more effectively addressed by governmental action directed at the actual problems—e.g., prosecuting litterers *(Schneider);* prosecuting as trespassers solicitors who do not depart when requested by homeowners to do so *(Struthers);* requiring organizations soliciting contributions to disclose how receipts are used *(Village of Schaumburg).* In the case at bar, unauthorized disclosure (or other use) of private conversations is a central aspect of the very evil the challenged statutory provisions are designed to combat.

B.

The court also notes that "[r]eporters often will not know the precise origins of information they receive from witnesses and other sources, nor whether the information stems from a lawful source," or, indeed, "whether material they are considering publishing has previously been disclosed to the public." Op., p. 127, As a result, the court opines, "[i]t is likely that in many instances these [challenged statutory] provisions will deter the media from publishing even material that may lawfully be disclosed under the Wiretapping Acts." *Ibid.* I think the court overstates the potential problems of the media. One would suppose that a responsible journalist—whether press or broadcast—would be unlikely to propose publication of a transcript of an apparently newsworthy conversation without some effort to insure that the conversation in fact took place and to authenticate the identities of the parties to the conversation. As part of such an inquiry, the question whether the parties to the conversation had authorized its recording and release, or whether others had lawfully intercepted the conversation, would seem naturally to arise. Moreover, current technology would make it relatively easy to determine



whether the conversation had been the subject of a prior press or broadcast report.[6]

In my judgment, a more substantial First Amendment difficulty is posed by the fact that the person or entity charged with knowing or having "reason to know" that a published conversation was unlawfully intercepted is called on to contest before a judicial fact-finder (whether jury or judge) a plaintiff's allegation of knowledge or "reason to know." But the difficulties attendant on fact-finder oversight of journalistic practice (or, indeed, of public disclosure by non-journalists) can, I believe, be met by adoption of the procedural proposals advanced in the brief for the United States:

> In criminal prosecutions under Title III, *scienter* must be proved beyond a reasonable doubt. In civil cases *scienter* ordinarily would be subject to a conventional preponderance-of-the-evidence standard. When a claim is brought for disclosure of information about matters of public significance by persons who were not involved in the illegal interception, however, a preponderance-of-

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[6] On occasion, inquiry of the kind suggested might indeed take a few days. But news reporting—especially with respect to events (such as a conversation) that are concluded, rather than still evolving—need not be an instant process. In the case at bar, it appears that defendant Vopper did not broadcast the conversation until some months after defendant Yocum gave him a copy of the tape. Deposition of Frederick W. Vopper, App. 60a-61a. On the other hand, the *New York Times* published a portion of the intercepted conversation that gave rise to *Boehner v. McDermott* the day after it received the tape. The *New York Times* story also reported that the tape had been "made . . . available to the New York Times" by "a Democratic Congressman hostile to Mr. Gingrich who insisted that he not be identified further" and who told the *Times* that the tape had been given to him [on January 8, 1997] by a couple who said the tape "had been recorded [on December 21, 1996] off a radio scanner, suggesting that one participant was using a cellular telephone." NY Times, January 10, 1997, p. 1, col.3.

> the-evidence standard may operate to deter the publication of information that was *not* the product of illegal surveillance. To avoid that result, it might prove appropriate for district courts to impose a higher standard of proof of *scienter* in such cases, such as proof by "clear and convincing" evidence, and for appellate courts to conduct independent review of the findings of the trier of fact. *Cf. Gertz v. Robert Welch, inc.*, 418 U.S. 323, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (requiring clear and convincing evidence of "actual malice" in defamation cases); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 498-511, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) *(de novo* appellate review offendings regarding actual malice). See generally *Waters v. Churchill* 511 U.S. 661, 669-71, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) (plurality opinion) (discussing circumstances in which First Amendment requires modifications of burdens of proof and other procedural rules).

Brief for the United States, pp. 40-41 n.8.[7]

II.

As the court's opinion makes plain, the First Amendment values of free speech and press are among the values most cherished in the American social order. Maintenance of these values (and the other values of the Bill of Rights) against overreaching by the legislature or the executive is among the

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[7] The court's decision has the anomalous consequence of cloaking Yocum, who is not a "media defendant," with the First Amendment protections the court deems appropriate for radio reporter Vopper and the two radio stations. I have undertaken to explain in footnote 3, supra, that in my judgment Yocum has a far more tenuous First Amendment claim (if any) than the media defendants. I do not think that, merely by virtue of the fortuity that the plaintiffs have elected to sue Yocum and the media defendants (which the plaintiff in *Boehner v. McDermott* did not do), Yocum becomes a third-party beneficiary of whatever First Amendment protections may accrue to the media defendants.



judiciary's major and most demanding responsibilities. In the case at bar, however, the First Amendment values on which defendants take their stand are countered by privacy values sought to be advanced by Congress and the Pennsylvania General Assembly that are of comparable—indeed kindred—dimension. Three decades ago the late Chief Judge Fuld of the New York Court of Appeals put the matter well in *Estate of Hemingway v. Random House,* 23 N.Y.2d 341, 348, 296 N.Y.S.2d 771, 244 N.E.2d 250, 255 (1968) (in words that the Supreme Court has quoted with approval, *Harper & Row Publishers v. Nation Enterprises,* 471 U.S. 539, 560, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985)):

> The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.

**APPENDIX B**

[Filed Jun. 17, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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CIVIL NO. 3:CV-94-1201

(Judge Kosik)

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GLORIA BARTNICKI AND
ANTHONY F. KANE, JR.,
*Plaintiffs,*

v.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS, KEYMARKET OF NEPA, INC., d/b/a/ WILK RADIO, LACKAZERNE, INC., d/b/a WGBI RADIO, JANE DOE and JOHN DOE, and JACK YOCUM,
*Defendants.*

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MEMORANDUM

Before the court are respective motions for summary judgment filed by Plaintiffs Bartnicki and Kane; Defendant Yocum; and Defendants Frederick Vopper, a/k/a Fred Williams; Keymarket of NEPA, Inc., d/b/a WILK Radio; and Lackazerne, Inc., d/b/a WGBI Radio (Media Defendants). The matter involves allegations of violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2511, 2520, and the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Con. Stat. Ann. § 5701 et seq. [hereinafter electronic surveillance acts]. For the following reasons, we deny the motions for summary judgment.



I. Background

Plaintiff Gloria Bartnicki is employed by the Pennsylvania State Education Association (PSEA) and, at relevant times, was assigned as a negotiator in a contract dispute between the teachers' union and Wyoming Valley West School District. Plaintiff Anthony Kane, Jr., was a teacher at Wyoming Valley West High School and president of the PSEA's local union representing the teachers of the school district.

During the pendency of the negotiations between the teachers' union and the school board, a citizens group, Wyoming Valley West Taxpayers Association (Association), was formed for the purpose of opposing the union's proposals. Defendant Jack Yocum was president of the Association.

It is represented that the contract negotiations were the regular subject of the local media.

In May of 1993, Plaintiffs Bartnicki and Kane engaged in a telephone conversation about the union's demands and the negotiations. The conversation occurred via a transmission from Plaintiff Bartnicki's cellular car phone and Plaintiff's Kane conventional household telephone line. The conversation was intercepted and recorded by an unidentified party. The Plaintiffs allege that the interception of their communication was intentional, while the Defendants argue that the interception was inadvertent and unintentional.[1]

The Defendants' acquisition of the intercepted communication allegedly occurred as follows. A cassette containing a recording of the conversation was placed in Defendant Yocum's mailbox without any markings

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[1] Both parties have failed to supply any facts regarding the interception. However, both parties supply the court with theories on the methods of intercepting cellular communications.

identifying the depositing party or the person who made the recording. Defendant Yocum played the tape and recognized the voices as those belonging to the Plaintiffs.

There exists some dispute as to whom Defendant Yocum played the tape, but it is undisputed that Defendant Yocum provided Defendant Vopper of Defendant WILK's radio station with the recording. The recording was aired during Defendant Vopper's radio program.

## II. STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure states:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law [2]

The Supreme Court has held that Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2551 (1986). Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986); *see also Gile v. Optical Radiation Corp.*, 22 F.3d 540, 541 (3d Cir.), *cert. denied*, 115 S.Ct. 429 (1994).

Initially, to support its motion for summary judgment, the moving party must show the absence of a genuine issue

[2] Fed. R. Civ. P. 56.



concerning any material fact. *Celotex*, 477 U.S. at 322-23. Once the moving party has satisfied its burden, the non-moving party must present "affirmative evidence" to defeat the motion for summary judgment, consisting of verified or documented materials. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888-89, 110 S.Ct. 3177, 3189 (1990); *Anderson*, 477 U.S. at 256-57. Mere conclusory allegations or denials taken from the pleadings are insufficient. *Schoch v. First Fidelity*, 912 F.2d 654, 657 (3d Cir. 1990) (citations omitted).

In evaluating a motion for summary judgment, the entire record must be examined in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences derived from the evidence. *Torre v. Casio, Inc.*, 42 F.3d 825, 830 (3d Cir. 1994); *White v. Westinghouse Electric Company*, 862 F.2d 56, 59 (3d Cir. 1988).

## III. DISCUSSION

Media Defendants motion this court for the granting of summary judgment because 1) they did not violate the electronic surveillance acts and 2) they are protected by the First Amendment.

Media Defendants' first argument is that they did not violate the applicable statutory provisions. *See* Document 56 at 12. In moving for summary judgment, Media Defendants state that the record establishes that Media Defendants did not intercept or tape the electronic communication between the Plaintiffs. We agree that there exists no genuine issue as to this fact, but that is not dispositive of Media Defendants' compliance with the electronic surveillance acts. The federal statute provides that a person violates the act if he "intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or *having reason to know* that the

information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." 18 U.S.C. § 2511(1)(c) (1996) (emphasis added). The state electronic surveillance statute parallels the federal statutory language. *See* 18 Pa. Con. Stat. § 5703. Accordingly, a violation of these acts can occur by the mere finding that a defendant had a reason to believe that the communication that he disclosed or used was obtained through the use of an illegal interception. Such an interpretation of the statute adheres to the purpose of the act which was to protect wire and oral communications and an individual's privacy interest in such. To allow a third party who is provided access to the intercepted communications to use the contents of the intercepted communications knowing or having reason to know that such communications were illegally intercepted would defeat the purpose of both the federal and state act. *See Natoli v. Sullivan*, 606 N.Y.2d 504, 507 (N.Y. Sup. Ct. 1993), *aff'd*, 616 N.Y.S.2d 318 (N.Y. App. Div. 1994).

In reviewing the record, we believe that there exists a genuine issue as to a material fact as to whether Media Defendants knew or had reason to know that the communication was illegally intercepted. *See Forsyth v. Barr*, 19 F.3d 1527, 1539 (5th Cir.), *cert. denied*, 115 S. Ct. 195 (1994). Media Defendants point out that there exists a great likelihood that the conversation was inadvertently intercepted and recorded, thus outside the scope of both statutory provisions. *See* Document 56 at 7-8 (providing circumstances in which the cellular conversation might have been intercepted unintentionally); Document 72 at 2 (citing *Bayges v. SEPTA*, 144 F.R.D. 269, 271-72 (E.D. Pa. 1992), for the proposition that unintentional interceptions do not offend the statute). On the other hand, the Plaintiffs note that there exists references within the conversation indicating the confidential nature of the conversation and the fact that it was being conducted via a cellular telephone, as well as the relative



difficulty in intercepting such a communication. *See* Document 53 at 7-10; Document 54; Document 68 at 9-13. Therefore, Media Defendants' motion for summary judgment as it pertains to the argument that they did not violate the electronic surveillance acts is denied.

Defendant Yocum moves for summary judgment also alleging that he was not involved in intercepting the communication and that the communication may have been legally intercepted. *See* Document 45; Document 49 at 13-18. The record reflects that Defendant Yocum used and disclosed the contents of the conversation, as evidenced in his uncontroverted disclosure of the recording to Media Defendants. In accordance with our analysis of Media Defendants' argument on this issue, we find that there exists a genuine issue of material facts as it pertains to Defendant Yocum knowing or having reason to know that the communications were illegally intercepted. Therefore, it is inappropriate for us to grant summary judgment to Defendant Yocum on this ground.

Media Defendants also move for summary judgment based on their First Amendment rights. They assert that the broadcasting of the audiotape which was "newsworthy" was protected by the First Amendment and therefore was not prohibited by the electronic surveillance acts.

Media Defendants correctly note that it is well-established that where the media lawfully obtains truthful information about a matter of public significance or concern, government officials may not constitutionally punish the publication of that information absent the need to further a government interest of a higher order. *See* Document 56 at 14 (citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S. Ct. 1535 (1978); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99 S. Ct. 2667; *Florida Star v. B.J.F.*, 491 U.S. 524, 109 S. Ct. 2603 (1989); *Oklahoma Publishing Co. v. United States*, 515 F. Supp. 1255, 1259 (W.D. Ok. 1981)).

However, these cases addressed matters where a state actor attempted to place a prior restraint on specified speech or where the intentional interception was legal but the disclosure was illegal.

In the matter before this court, there exist no statutory provisions specifically designed to chill free speech. Rather, at issue is the federal and state electronic surveillance laws which are general application laws. These surveillance laws apply equally to the general public and impose no further restrictions on the media. Accordingly, there exists no indicia of prior restraint or the chilling of free speech.

The Supreme Court has specifically addressed the constitutionality of general application laws as they pertain to the media. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 668-70, 111 S. Ct. 2513, 2518 (1991). The Supreme Court in Cohen addressed the imposition of a fine levied against a publisher for the publication of a confidential informant's identity. The case was analyzed pursuant to Minnesota's doctrine of promissory estoppel, and the Court deemed the doctrine as one of general applicability. *See id.* at 670. The Court, in distinguishing a similar line of cases that Media Defendants here rely on, stated that it is "well-established" that generally applicable laws "do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 669. The Court recognized that such a statement applies even when the information obtained was truthful because, as the Court stated, "it is beyond dispute that the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Id.* at 670 (internal quotation marks omitted).

In reviewing both the federal and the state electronic surveillance laws, we conclude that both acts are matters of general applicability. We do not find that the statutes target or



single out the press. We, therefore, deny Media Defendants' motion for summary judgment as it applies to this argument.

Defendant Yocum, in his motion for summary judgment, additionally argues that he was a "newsgather" [sic] for Media Defendants and therefore should be afforded the same First Amendment protections. *See* Document 49 at 19-21. The same analysis applies, and Defendant Yocum's motion for summary judgment on the basis of the First Amendment also fails.

Plaintiffs Bartnicki and Kane also move this court for summary judgment because "the pleadings and depositions demonstrate that there are no disputed material issues of fact regarding the question of whether the Defendants, Vopper, WILK and Yocum intentionally disclosed and published the surreptitiously taped telephone conversation between the Plaintiffs, Bartnicki and Kane without their permission." See Document 40. The Plaintiffs assert that such a showing demonstrates the Defendants' violation of the electronic surveillance acts and entitles them to summary judgment. Although the court agrees that there exists no genuine issue of material fact as it relates to Defendant Yocum using the communication and disclosing it to Media Defendants and to Media Defendants' use and disclosure of the communication to its listening audience, such a showing is insufficient to demonstrate a violation of the applicable statutes.

The electronic surveillance acts seek to impose both criminal and civil sanctions on the interception, use, or disclosure of *illegally* intercepted electronic communications. However, the acts do not impose criminal or civil penalties for legally intercepted communications. For instance, the federal and state electronic surveillance laws do not prohibit the interception, use, or disclosure of unintentionally intercepted communications. *See* 18 U.S.C. S 2511 (1995); 18 Pa. Con. Stat. Ann. § 5704 (1995). The record reveals that there exists a genuine issue of material fact with regard to

whether the communication was illegally intercepted. In addition, there exists a genuine issue as to whether the Defendants knew or should have known that the communication was illegally intercepted.

Because the legality of the interception and the Defendants' state of mind are material facts at issue, we deny the Plaintiff's motion for summary judgment.

## IV. CONCLUSION

We find that there exists genuine issues as to material facts, and we accordingly deny all the motions for summary judgment.



# APPENDIX C

[Filed Nov. 8, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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CIVIL NO. 3:CV-94-1201
(Judge Kosik)

GLORIA BARTNICKI and ANTHONY F. KANE, JR.,
*Plaintiffs*,

v.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS, KEYMARKET OF NEPA INC., d/b/a WILK RADIO, LACKAZERNE, INC., d/b/a WGBI RADIO, JANE DOE and JOHN DOE, and JACK YOCUM,

*Defendants.*

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## MEMORANDUM

Before the court is Defendants' motion to reconsider our decision of June 17, 1996, where we denied the cross motions for summary judgment. *See* Document 73. The matter involves allegations of violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2511, 2520, and the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Con. Stat. Ann. § 5701 *et seq.* [hereinafter acts]. For the following reasons, we deny the motion for reconsideration.

## I. STANDARD OF REVIEW

"The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d

Cir. 1985), *cert. denied*, 476 U.S. 1171 (1986). As one court has noted:

> The motion to reconsider would be appropriate where, for example, the Court has patently misunderstood a party, or has made a decision outside of the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension. A further basis for a motion to reconsider would be a controlling or significant change in the law or facts since the submission of the issue to the Court. Such problems rarely arise and the motion to reconsider should be equally rare.

*Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983).

Parties must remember that a motion for reconsideration is not an appeal. Therefore, it is improper on a motion for reconsideration for the party to request "the Court to rethink what it had already thought through—rightly or wrongly." *Id.* Thus, a party "must show more than a disagreement with the court's decision." *Panna v. Firstrust Sav. Bank*, 760 F. Supp. 432, 435 (D. N.J. 1991).

## III. DISCUSSION

Defendants[1] motion this court to reconsider our denial of summary judgment because 1) Plaintiffs were unable to demonstrate the ability to prove at trial a necessary element of their case, i.e. that the conversation was intentionally intercepted and therefore illegal and 2) Defendants are protected by the First Amendment.

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[1] Defendants Frederick Vopper; Keymarket of NEPA, Inc.; and Lackazerne, Inc. (Media Defendants) and Defendant Yocum filed separate motions. *See* Document 75; Document 76. However, both motions address similar issues, and accordingly we need only address the motion for reconsideration in the singular.



First, Defendants contend that Plaintiffs' failed to demonstrate a material element of their case. Defendants argue that Plaintiffs' were required to show that the interception of the conversation was not inadvertent, and, therefore, illegal. We addressed this issue in detail in our previous Order. Both the federal and state acts impose liability to a user if he "knew or had reason to know" that the communication was intercepted. *See* 18 U.S.C. § 2511 (1996); 18 Pa. C.S.A. § 5703. In addressing these provisions in our previous Order, we stated:

> Accordingly, a violation of these acts can occur by the mere finding that a defendant had a reason to believe that the communication that he disclosed or used was obtained through the use of an illegal interception. Such an interpretation of the statute adheres to the purpose of the act which was to protect wire and oral communications and an individual's privacy interest in such. To allow a third party who is provided access to the intercepted communications to use the contents of the intercepted communications knowing or having reason to know that such communication w[as] illegally intercepted would defeat the purpose of both the federal and state act.

Document 73 at 5 (citations omitted).

Therefore, a violation of the acts can occur by the mere showing that Defendants "knew or should have known" that the communication was illegally intercepted. In our opinion, we stated:

> In reviewing the record, we believe that there exists a genuine issue as to a material fact as to whether Media Defendants knew or had reason to know that the communication was illegally intercepted. Media Defendants point out that there exists a great likelihood that the conversation was inadvertently intercepted and

> recorded, thus outside the scope of both statutory provisions. On the other hand, the Plaintiffs note that there exists references within the conversation indicating the confidential nature of the conversation and the fact that it was being conducted via a cellular telephone, as well as the relative difficulty in intercepting such a communication.

*Id.* at 5-6 (citations omitted).

Remembering that the burden of proof at trial is a preponderance of the evidence, we find that Plaintiffs have sufficiently demonstrated that Defendants "knew or should have known" that the communication was intercepted. As to the illegal element for a violation of the statute, both sides have offered sufficient theories of how the communication was intercepted. This goes beyond the mere characterization of unsupported allegations with which Defendants attempt to classify Plaintiffs' contentions. Accordingly, we find that there is sufficient evidence on which a reasonable jury could conclude, by a preponderance of the evidence, that Defendants violated the acts. As a result, we believe that Plaintiffs have met their burden.

Defendants have also sought reconsideration of our decision denying them summary judgment pursuant to their First Amendment argument. In seeking to have us reconsider our decision, Defendants cite a Pennsylvania Supreme Court decision that held: "Without dispute, it is in the public interest to have a free press. Thus, the legislature intended for the public interest and a free press to supersede the interest of an individual whose private conversation regarding his illegal activities had been *lawfully intercepted and lawfully obtained* by a newspaper." Document 80 at 5 (citing *Bottger v. Loverro,* 587 A.2d 712, 720-21 (Pa. 1991)) (emphasis added).

We need not discuss this rule because the Pennsylvania Supreme Court's decision clearly was addressing issues involving the lawful interception and lawful acquisition of



private conversations pertaining to illegal activities. The focus of this litigation is whether the disclosure was legal pursuant to the acts. In addition, it is disputed that the alleged illegal conduct, "a threat to blow-off a porch," was truly a threat of future illegal activity.

We deny the motions for reconsideration.

**APPENDIX D**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 98-7156

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GLORIA BARTNICKI and ANTHONY F. KANE, JR.

v.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS; KEYMARKET NEPA, INC., d/b/a/ WILK RADIO; LACKAZERNE INC., d/b/a/, WGBI RADIO; JANE DOE; JOHN DOE; JACK YOCUM

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS; KEYMARKET OF NEPA, INC., d/b/a WILK RADIO; LACKAZERNE, INC., d/b/a WGBI RADIO; JACKYOCUM,

*Appellants*

UNITED STATES OF AMERICA,

*Intervenor*

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SUR PETITION FOR REHEARING

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Present: BECKER, Chief Judge, SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, and BARRY, *Circuit Judges*, and POLLAK, *District Judge*[*]

The petition for rehearing filed by the Appellees and Amicus Pennsylvania State Education Association and the

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[*] Hon. Louis H. Pollak, Senior Judge, United States District Court for the Eastern District of Pennsylvania, as to panel rehearing only.



petition for rehearing filed by Intervenor United States in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petitions for rehearing are denied.

Judges Greenberg, Scirica, Nygaard, Alito and Rendell would have granted the petitions for rehearing.

Dated: FEB 25 2000

By the Court

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/s/ Dolores K. Sloviter
DOLORES K. SLOVITER
Circuit Judge

**APPENDIX E**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 98-7156

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GLORIA BARTNICKI AND ANTHONY F. KANE, JR.

v.

FREDRICK W. VOPPER, a/k/a FRED WILLIAMS; KEYMARKET OF NEPA, INC, d/b/a WILK RADIO; LACKAZERNE, INC., d/b/a WGBI RADIO; JANE DOE; JOHN DOE; JACK YOCUM

FREDERICK W. VOPPER, a/k/a FREDWILLIAMS; KEYMARKET OF NEPA, INC., d/b/a WILK RADIO; LACKAZERNE, INC., d/b/a WGBI RADIO; JACK YOCUM,

*Appellants*

UNITED STATES OF AMERICA,

*Intervenor*

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AMENDED SUR PETITION FOR REHEARING

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Present: BECKER, Chief Judge, SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, and COWEN*, *Circuit Judges*, and POLLAK, *District Judge*[**]

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* Hon. Robert E. Cowen, Senior Circuit Judge, as to panel rehearing only.

** Hon. Louis H. Pollak, Senior Judge, United States District Court for the Eastern District of Pennsylvania, as to panel rehearing only.



The petition for rehearing filed by the Appellees and Amicus Pennsylvania State Education Association and the petition for rehearing filed by Intervenor United States in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petitions for rehearing are denied.

Judges Greenberg, Scirica, Nygaard, Alito and Rendell would have granted the petitions for rehearing.

Dated: FEB 28, 2000

By the Court

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/s/ Dolores K. Sloviter
DOLORES K. SLOVITER
Circuit Judge